



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 157 of 2013 (OS)

ANDREW LIKAIBUA KATHUKU

ALIAS NGUGA M'KAIBI.....APPLICANT/PLAINTIFF

VERSUS

JACOB MIRITI KAARIA.....1ST RESPONDENT DEFENDANT

DANIEL MUTHAMIA KAARIA.....2ND RESPONDENT/DEFENDANT

PETER KOBIA M'ERIMBA.....INTERESTED PARTY

JUDGMENT

1. This suit was filed by way of Originating Summons but subsequently directions were taken to allow taking of evidence proceedings to proceed by way of *vivavoce*. The terms Applicant and Respondent shall be used to refer to Plaintiff and Respondent respectively.

2. By Originating Summons dated 24/6/2013 the Applicant/Plaintiff sued the 1st Respondent/Defendant claiming ownership by way of Adverse Possession over 1.70 acres of land parcel No. NYAMBENE/KIRINDINE 'A'/4353 (suit land). He sought for orders that: -

a. A declaration that the Plaintiff, Andrew Laikabua Kathuku alias Ngunga M' Kaibi has become entitled by Adverse Possession to 0.69 hectares from all that parcel of land known as L.R. NO. NYAMBENE/KIRINDINE 'A' 4353 registered in the name of SAMUEL KAARIA.

b. An order that the said Plaintiff be registered as sole proprietor of 0.69 acres of the suit land L.R. NO. NYAMBENE/KIRINDINE 'A' 4353.

c. An order that the 1st Defendant do execute all the requisite instructions and/or documents to effect transfer to the Plaintiff of the suit land and in default thereto this Honourable Court do authorize its deputy registrar to so execute the transfer instruments/documents on behalf of the Defendant.

d. That this Honourable Court do make further or better orders it may deem fit and just to grant to meet the orders of justice.

e. Cost of this suit to be borne by the Defendants.

3. The summons are based on the grounds that the Plaintiff has been in exclusive, open, Notorious and continuous occupation of the suit land since 1996 and that the Plaintiff has made substantial developments on the suit land by fencing, building of houses and cultivation thereon for a period in excess of 12 years.

4. The Plaintiff has annexed a supporting affidavit to the summons in which he deposes that he has been in occupation of the suit land since his childhood days in 1948. That during the land adjudication in 1990's he gathered his land being parcel No.3448 which was 4.09 Acres registered in his name on 8/2/1996. He claims that the 1st Defendant in the year 2000 in collusion with the Land Adjudication officer cancelled his name from L.R. No. 3448 and replaced it with the 1st Defendant's name and has annexed the altered registration gathering book. He states that he learnt of the cancellation when he went to present his booklet to the lands office. That he was then issued with another booklet allocating to him Parcel No. 4093. That the newly allocated parcel was 2.79 Acres less than his original parcel of land. He was later in 2004 issued with a title to parcel No. 4093 in his name as NGUNGA M'KAIBI whilst the 1st Defendant was issued with a title to parcel No.3448. That the 1st Defendant then in the year 2005 subdivided parcel No.3448 into three parcels being numbers 4351, 4352 and 4353. The 1st Defendant then

proceeded to sell parcel's No.4351 and 4352 to third parties namely James Kariuki Murungi and Francis Nteere respectively while parcel No.4353 remained with the 1st Defendant. The Plaintiff claims that while all that was happening, he continued to remain in occupation and use of parcel No.4353 and has remained thereon to date. He claims that a combination of the acreage for parcel No.4093 and 4353 (which measures 1.70 Acres) sums up to 4.09 Acres which was his original share and which he claims to have been in occupation all along. He contends that the 1st Defendant has never been in occupation of parcel No.4353. That he has tried to engage the Land's office to correct their records accordingly in vain precipitating this suit and prays for orders to issue as prayed.

5. The 1st Defendant passed on 19/12/2015 and was substituted by Jacob Miriti Kaaria after obtaining grant ad Litem issued on 9/8/2016 vide a ruling delivered on 23/11/2016.

6. Through a Notice of motion dated 23/5/2016 one Daniel Muthamia Kaaria who was not a party to this suit sought to enjoin Peter Kobia to the suit as an interested party in respect to parcel No.NYAMBENE/KIRINDINE/3594. That application was allowed vide an order dated 23/10/2017.

7. The 1st Defendant filed its grounds of opposition dated 28/8/2013 claiming that the suit was res judicata and that the Plaintiff is an illegal trespasser on the suit land.

8. The substituted 1st Defendant filed a Witness Statement dated 4/7/2017 in which he admits that indeed land parcel number 3448 was originally gathered and occupied by the Plaintiff, that his late father secretly subdivided the Plaintiff's land into 4 portions being 4351- 4353 and 4093. He claims that his father sold 4351 and 4352 to third parties who never took possession of these parcels of land. That 4353 remained in his late father's name and 4093 was registered in the name of the Plaintiff. He concedes that the said acts of subdivision and selling by his late father were illegal and carried out secretly. He claims that there have been efforts to revert the parcels of land to their rightful owner. The Plaintiff urged the Court to grant the land to the Plaintiff to avert family curses and he claims that his family has its own land that belonged to their late father. He confirms that the Plaintiff is in possession of the suit land and has substantively developed it.

9. The interested parties filed several documents in compliance with order 11. The matter proceeded viva voce. PW1 the Plaintiff adopted his witness statement. He confirmed the portion of land he occupies is 4.09 acres. That demarcation was done in 1996. He produced the following documents; copy of cancelled registration gathering booklet for parcel No.3448, copy of booklet for parcel No. 4093 in name of plaintiff, copy of green card for parcel No.4093.

10. PW2 testified that the Plaintiff was well known to him. They are neighbours and that the Plaintiff has lived on the suit land since 1948.

11. DW1 - the 1st Defendant adopted his statement and confirmed that the Plaintiff lived on the suit land since birth. He adopted his statement and produced his late father's death certificate, copy of grant ad litem issued on 9/8/2016 and a letter from the chief. That his father had other parcels of land that he left for his family.

12. DW2 - the 2nd Defendant did testified and called several witnesses being DW3 - Mr. Mamu who is the brother to the 1st and 2nd Defendants who testified that parcel No.4353 is occupied by the 2nd Defendant and not the Plaintiff. DW4 - Jane Kamau the wife of the deceased and mother to 1st and 2nd Defendant testified that the suit land was sold but she lives there and that the Plaintiff lives elsewhere. That the interested party was not known to her. DW5 John Kirathe the brother to 1st and 2nd Defendant denied that the Plaintiff lives on the suit land. The interested party testified that his claim is in respect to parcel No.3594 and that he had no claim against the Plaintiff.

13. In submissions the Plaintiff reiterates his averments in the summons and oral evidence. He believes that he has demonstrated that his claim for adverse possession is merited since he adduced evidence to show he is in actual, continued and notorious occupation of the suit land since 1948. That his evidence was collaborated by the evidence of PW2 and DW1. He dismisses the evidence adduced by the 2nd Defendants' witnesses for inconsistencies on who exactly was in occupation of the suit land. He challenges the will produced by the 2nd Defendant for having alterations that are Not countersigned.

14. The 1st Defendant reiterates in his statement on his submissions which are in support of the plaintiff's claim and prays for time Plaintiff's claim to be allowed.

15. The interested party submitted to the effect that he is wrongfully enjoined to the instant suit as he has no claim against the Plaintiff.

16. There are no submissions by the 2nd Defendant on record at the date of the writing this judgement.

Analysis and determination

17. The issues for determination are; whether the joinder of the IP was merited; whether the Originating Summons are incompetent before the Court for failure to annex certified copy of the title; whether the Plaintiff has established title by way of adverse possession; who meets the costs of the suit.

18. Upon perusing and analysing the evidence presented by the interested party it is clear that the joinder of the Interested party was not necessary in the case. I say so because the interested party in his witness statement has admitted that he has no dispute with the Plaintiff. He was enjoined by a party who for all purposes and intents was and remains a stranger to the suit. His case relates to parcel No NYAMBENE/KIRINDINE/3594 which he claims to have purchased from M'Mwendwa Geoffrey in 1987. The original parcel of the land

was 2680. In his evidence he stated that he has no dispute with the Plaintiff who is his neighbour. His dispute is with the 2nd Defendant whom he claims to have many cases pending at Maua Law courts. The land which is subject of this case is NYAMBENE/KIRINDINE/3594. I have perused the plan attached to the Interested party's Replying affidavit dated the 9/2/2017 and it is evident that the parcel No 3594 is different from parcel 3448 from which 4353 is derived from. The Court finds that the 2nd Defendant has No cause of action or *prima facie* case against the interested party as concerns this matter. Indeed the Plaintiff has No claim against the interested party.

19. In view of the finding in Para 17 above and in the interest of justice the orders issued on the 16/10/17 inhibiting parcel No NYAMBENE/KIRINDINE/3594 are hereby vacated forthwith.

20. The initial parties to this suit were the Plaintiff and one Samwel Kaaria M'Mkaibi. Upon his death his son Jacob Miriti Kaaria was substituted with the leave of the Court on the 23/11/2016. It is not clear from the record how the 2nd Defendant became enjoined as a party to the case. He is not a party to the suit he did not show evidence of legal representation of the estate of the deceased. There is no application for substitution by the 2nd Defendant on record. I have looked at the Court proceedings as well and there is no indication of how the 2nd Defendant was enjoined as a party to the suit. The Court declares that the 2nd Defendant is improperly in the suit having sauntered in without any enjoinder neither by the existing parties nor with leave of the court. Going by the documents and the evidence of the 2nd Defendant he has staked a position of a Defendant against the Plaintiff's claim. He is therefore removed from the record and all the proceedings in respect to him are expunged from the record.

21. It is Noteworthy that the 2nd Defendant did not file any response to the Plaintiff's case. He has however filed witness statements and list of documents. The question one would ask is what is his defence to the plaintiff's claim? In his evidence in Court he testified and stated that the Plaintiff is his neighbour but denied that he occupies parcel No 4353 but parcel 4093 which is the plaintiff's land. He maintained that the land parcel 4353 has been sold to one Stephen Mutai. He produced a will which he claimed to be authored by his father. Para 3 of the said will makes reference to parcel No 4153 which is said to have been sold to one Gitobu Imanyara. However, there is an attempt to erase parcel No 4153 and superimpose 4353. This piece of evidence is inconsistent with the evidence of the 2nd Defendant that the land was sold to one Stephen Mutai. The Court finds and holds that in view of the alteration the credibility of the document is called into question.

22. DW3, DW4 and DW5 all gave evidence in line with the DW2 which is that the Plaintiff does Not occupy the suit land. They were all sketchy and since they claim to be the plaintiff's neighbours, it would appear that their evidence was skewed to lie. The Court finds and holds that their evidence when put on a scale cannot be believed. Their main focus is that the land has been sold to a third party.

23. I have perused the pleadings of the Plaintiff including his list of documents and I did Not find a certified copy of the title in respect to the suit land. He has attached the extract of the green card for parcel No 4093 which is registered in his own name. He cannot claim adverse possession against his own title. In his pleadings and evidence he states that his claim is in respect to the original parcel No 3448 which was registered in the name of Samwel Kaaria and which land was subdivided into parcel Nos. 4351 4352 and 4353. His claim is specifically on parcel No 4353 which he claims to be registered in the name of Samwel Kaaria. By the time of hearing the case the Plaintiff did not present the said copy of the title so that his suit is compliant with Order 37 rule 7 of the Civil Procedure Rules.

24. Section 38 of the Limitation of Actions Act provides that;

“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.”

25. The Plaintiff in filing the Originating Summons in this case to assert his rights of title under adverse position had not complied with the above provision. However, *Order 37 Rule 7 of the Civil Procedure Rules as follows:*

“An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”.

26. The wording of the above provisions is mandatory. The orders which will finally be made in the case should not be in vain. The Plaintiff must present a prima facie prove that the 1st Defendant is the registered proprietor of the suit land by annexing a certified copy of the title or an extract of the green card. Adversity of a title must be established as against a known owner and not in a vacuum. More so in the face of evidence from DW3-DW5 that the suit land has been sold to a third party. If it is found to be true then the Court will have issued orders against persons that are not parties to the suit. That will offend the right to be heard as enshrined in Article 50 of the Constitution of Kenya.

27. In **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR** the Court of Appeal stated as follows:

“That the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3 D (2) of order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons. In this case, the appellant did not annex the certified extracts of land title LR Nos 1756 and 1757 before the sub-division or even after the sub-division. The burden was on the appellant to produce the certified extracts of title in respect of the suit properties.”

28. Similarly, in the case of **Moses Chepkonga Cherono v Margaret Njoki Kinyanjui [2017] eKLR D.O Ohungo.J** also held that failure to annex a certified extract of the title to the land is fatal to the Plaintiff's claim.

29. The Plaintiff has failed to comply with the provisions of Order 37 of the Civil Procedure Rules. In view of this the Court does not find it prudent to determine the key issue whether or Not the Plaintiff has established title by way of adverse possession. It will serve No purpose as there will be difficulty in effecting any orders if the matter is determined in favour of the plaintiff. The true owner of the land, if different from the current parties, will have been condemned unheard.

30. Final orders;

- a. The Court finds and holds that the suit is incompetent. It is dismissed with costs.
- b. The 2nd Defendant and the Interested party are expunged from suit together with all the proceedings in their respect.
- c. The orders issued on the 16/10/17 inhibiting parcel No NYAMBENE/KIRINDINE/3594 be and are hereby vacated forthwith.
- d. The Plaintiff shall pay the 1st Defendant's costs. The 2nd Defendant shall pay the costs of the Interested Party.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In the presence of;

C/A Mutwiri

M.G Mbijiwe holding brief for Mbaabu for Plaintiff

1st Defendant present

Murango holding brief for Kimathi for 2nd Defendant

Kiogora Arithi holding brief for interested party

Interested party