



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC NO. 72 OF 2004 (OS)

FRANCIS MAWANTHI IBUA.....PLAINTIFF

VERSUS

CYPRIAN KIGORWE.....1ST DEFENDANT

SOLOMON GITUNDU.....2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated 23/8/04 brought under section 38 of the Limitations of Actions Act, CAP 22 and Order XXXXVI Rule 3D and 7 of the Civil Procedure Rules (now repealed) the Plaintiff sued the 1st Defendant claiming an ownership right over Title Number L.R NYAKI/GIAKI-KIBURINE/556 hereafter referred to as the suit land by way of Adverse Possession and invited the Court to make a finding on the following questions;

- a. Whether the Plaintiff has been in occupation of 9.0 acres of the Suitland for a period of over 12 years.
- b. Whether the said occupation has been continuous open and uninterrupted therefore adverse.
- c. Whether by virtue of the said occupation the Plaintiff has been entitled to the said land.
- d. Whether an order should issue for the transfer of the said land to the Plaintiff absolutely.
- e. Who pays the costs of this suit?

2. In his supporting affidavit the Plaintiff deposed that he settled on the suit land (9 acres) together with his mother, brother and sisters in the year 1970 and built a homestead and started cultivating and continued to make other developments thereon. That the occupation and use of the suit land has been open, uninterrupted for way over 40 years. That it was not until 7/8/04 that the 1st Defendant served him with a letter claiming that he had trespassed on the suit land. He believes that he has acquired prescriptive rights over the suit land and the title of the 1st Defendant's has been extinguished.

3. The 1st Defendant in his defence contained in a Replying Affidavit dated the 12/5/15 avers that the suit land measuring about 10 acres is situated in a settlement Area and was allocated to him in the year 1993 after applying for it from the Government of Kenya. That upon being issued with a title deed he took possession of the suit land. That he later fell ill in the year 2003 and could not continue developing the land so on his return in the year 2004, found that the Plaintiff and his family had encroached on his land. His demands to vacate the suit land were ignored. The 1st Defendant then proceeded to sell the suit land to the 2nd Defendant and transferred the title to him. He claims to have been unaware of the instant suit and that he was never served with the summons.

4. By an application dated the 4/3/14 the Plaintiff sought orders to enjoin the 2nd Defendant into the suit which application was duly granted.

5. The 2nd Defendant had sued the Plaintiff herein in ELC No. 105 of 2014 through a plaint dated 10/7/14 seeking the following orders;

- a. A declaration that the Plaintiff is the registered absolute proprietor of parcels of land comprised in the title Nos. NYAKI/KIBURINE/478 and 556 respectively.
- b. An order that the Defendant be evicted with the assistance of the police from all that land comprised in titles Nos. NYAKI/KIBURINE/478 and 556.

c. A permanent injunction to restrain the Defendant by himself his servants and or agents from re-entering all that land comprised in title nos. NYAKI/KIBURINE/478 and 556

d. Damages

e. Costs

f. Any other or further relief this court may deem fit to grant.

6. On the 19/7/16 the 1st Defendant filed a motion in Court seeking the consolidation of this suit with ELC No 105 of 2014 which involved the same parties and the same subject matter. The application was duly granted on the 20/7/16 with the lead file being the ELC 72 of 2004 (OS). The defense and Counterclaim of the 2nd Defendant therefore is contained in ELC 105 OF 2014.

7. In that suit the 2nd Defendant claims to be the registered absolute proprietor of parcel Nos. Nyaki/Giaki-Kiburine/478 and 556 measuring 2.23 and 4.05 hectares which he bought for valuable consideration from Stanley Gitiye M'akwalu and Cypriano Kigorwe respectively who were the previous registered owners. That prior to the purchase he instructed his lawyers to conduct an official search which confirmed the owners of the suit land with no encumbrances. That consent of the land board was duly obtained. He claims that when he went to take possession in 2014 he found the Plaintiff on the land who confronted him with threats of violence and insisted to be the owner of the suit land. He avers that the continued occupation of the suit land by the Plaintiff has barred him from enjoying the ownership and use of the suit land which he intended to use for agricultural and dairy farming.

8. At the hearing, PW1- the Plaintiff testified that he entered the suit land in 1970 when it was unoccupied and bushy before the land was adjudicated. That he has lived there since, has constructed a homestead, planted trees and crops and annexed photographs of the developments done on the land. He identified his homestead on the photographs and that of his mother and a mango tree which he claims to have planted in the year 1976. He produced a green card to show the land was registered in the name of the 1st Defendant on 31/3/93 then the land was transferred to the 2nd Defendant on 17/5/13 while the suit was pending in Court. He claims that he was not informed of the sale and both the 1st and 2nd Defendants have never stepped on the suit land. That he occupies 9 acres of the suit land for which he is claiming through Adverse Possession. He adopted his supporting affidavit, statement of defence and counterclaim and witness statement.

9. In cross examination asserted that he has lived on the land since 1970. That there are no documents when one gathers land as at that time it is unoccupied. The 1st Defendant became registered as owner of the suit land in 1993, and he filed suit in 2004, 11 years after registration of the title. That he has not been denied access to the suit land by either of the Defendants. Save for a demand letter sent by the 1st Defendant in 2004, no other step has been made to remove him from the land.

10. Further he informed the Court that the original land was parcel 164 after which it was subdivided to yield parcel 479. Parcel 479 was further subdivided to yield parcel 556 which he is claiming title by way of Adverse Possession. All the titles were registered in the name of the 1st Defendant before selling it to the 2nd Defendant, who is the current registered owner.

11. PW2 –Saverio Kabete Mwikamba testified and informed the Court that he is a neighbor to the Plaintiff and that he knows both the Plaintiff and the Defendants. He stated that the Plaintiff has been cultivating on the suit land for many years and he was not aware that the suit land is registered in the name of the Defendants. That the Plaintiff utilizes the entire parcel of land. He confirmed that the green card shows that the suit land was a subdivision from parcel No 479 which was registered in the name of the 1st Defendant.

12. DW1, the 1st Defendant testified that he applied for land from the Government which was then allocated to him. That the initial parcel of land that was allocated to him was parcel No. 164 measuring approximately 20-21 acres which was registered in his name on 18/1/1977, he later subdivided it into parcels number 478 and 479 and thereafter parcel number 479 was subdivided to parcel numbers 555 and 556. He claims to have informed the Plaintiff of the sale of parcel No. 556 in 2013 because the Plaintiff was in occupation. He claimed that he was unaware of this suit that was filed in 2004. He affirmed that the Plaintiff was in occupation then and is still in occupation albeit by force. He conceded that he has never lived on the suit land. He disputes that the Plaintiff has been in occupation for over 40 years and contends that the Plaintiff only occupies a portion of the suit land.

13. DW2- Solomon Gitundu adopted his witness statement and the list of documents. He testified that he purchased the land in 2012 from the 1st Defendant after conducting a search and a site visit and saw that the land was vacant. That later in 2014 he found the Plaintiff and his family on the suit land and on enquiring from the 1st Defendant he was informed that he had given the land to his family and friends to live temporarily. On the suit land he noted that the land was not bare. There were crops and thickets on the suit land. He however stated that there were no mango or dwelling houses on the land. Generally, he informed the Court that he did not know that the plaintiff was living on the suit land and only learnt in 2014 after he had purchased the land. He noted that from the demand letter the Plaintiff was in occupation of both parcel No. 556 and 478. He disputes that the photographs produced were taken from the suit land.

14. The Plaintiff in his submissions explains how the suit land was subdivided from 479 which originated from parcel No. 164 that was registered in the name of the 1st Defendant. That the Plaintiff has proved the ingredients for a claim in Adverse Possession by demonstrating continuous open occupation and use for over 12 years, developments made there on. That the suit ELC No 105 of 2014 seeks to evict the Plaintiff from the suit land so it is testament he has been in occupation of the suit land. That he has demonstrated the developments he has made on the suit land through the years of peaceful and uninterrupted occupation. That his evidence of occupation since 1970 was corroborated by the PW2. He claims that by the time the 2nd Defendant purchased the suit land he had already acquired an overriding interest over the suit land. That it was confirmed by DW1 that at the time he sold the land to the DW2 the Plaintiff was already in occupation. DW1 also admitted in his reply to the Originating Summons that the Plaintiff was in occupation of the suit land in the year 2004. He notes that there was a memorandum of appearance filed by the lawyers of the DW1 on 13/9/2004 in respect to the Originating Summons which shows

that the 1st Defendant was well aware of the pending suit when he sold the suit land to the 2nd Defendant and the subsequent transfer of title.

15. The Defendants submitted that the photographs produced were taken after both suits were instituted and claims that the developments in the suits land could only have been done thereafter. That since the suit land was registered in 1993 and the suit herein was filed in 2004, it is premature on account that only 11 years had run contrary to the provisions of section 7, 37 and 38 of the Limitation of Actions Act and therefore the suit is destined to fail. That the summons is captioned as Notice of Motion instead of Originating Summons as required in law and contends, that they are defective in form. That the plaintiff has failed to attach a copy of the title as is mandatorily requires under section 37 (2) of the Limitations of Actions Act. That the Originating Summons is not marked as required under Order 37 rule 15 and therefore is incompetent.

16. Having considered the pleadings the evidence and the submissions of the parties the issues that fall for determination are;

- a. Whether the Plaintiff has been in occupation of 9.0 acres of the suitland for a period of over 12 years.
- b. Whether the said occupation has been continuous open and uninterrupted therefore adverse.
- c. Whether by virtue of the said occupation the Plaintiff is entitled to the said land.
- d. Whether an order should issue for the transfer of the said land to the Plaintiff absolutely.
- e. Whether the Plaintiff should be evicted from the suit land.

17. Under Section 28 of the Land Registration Act, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.

18. Section 7 of the Limitation of Actions Act cap 22 states that;

“Actions to recover land may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

19. Section 38 of the Limitation of Actions Act, Cap 22;

“Registration of title to land or easement acquired under Act (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.”

20. In the words of Gicheru, JA in the case of **Kweyu v Omuto, C A Civ Appeal 8 of 1990 (as yet unreported)**;

“In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts”

21. In the case of **Jandu v Kirpal and another [1975] E A 225, at p 232**. While this definition is a fair starting point, from a consideration of the many cases decided, it is possible to define “Adverse Possession” more fully, as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.

22. Finally, in the case of **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

‘...The Plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.’

23. Has to whether the Plaintiff has been in occupation of the suit land for a period in excess of 12 years, it was the Plaintiff’s testimony that he has been in occupation of the suit land since the year 1970. The PW2 who is a neighbor to the suit land corroborated that evidence. He informed the Court that as early as when he was 14 years the Plaintiff used to cultivate the suit land. That he knew this because he lived at their home which was across the river from the suit land. The Plaintiff explained how the suit land was initially acquired then subdivided into the present parcels of land whilst he was still in occupation. He also produced photographs of the suit land which show his homestead and that of his mother on the suit land and a mango tree that he claims to have planted in the year 1976. The Defendants also conceded that the Plaintiff has been in occupation of the suit land. DW1 in his replying affidavit avers that he found the Plaintiff and his family on the suit land in the year 2004. He also confirmed in his oral testimony that while he sold the land to DW2 the Plaintiff was still in occupation of the suit land. He also conceded that he has never lived on the suit land in oral evidence. DW2 however seems to suggest that the Plaintiff entered the

suit land in 2014. In their submissions the Defendants did not belabor at challenging or laying a clear basis on the exact year which the Plaintiff entered the suit land. The Court was not given evidence of any steps taken by the Defendants to dispose the Plaintiff. Neither has the Plaintiff relinquished his possession to the Defendants.

24. Based on the evidence adduced above the Court finds that the Plaintiff's evidence that he has been in possession and occupation of the suit land since 1970 to date is on the balance of probabilities tenable.

25. Was the occupation of the suit land by the Plaintiff adverse to the title owner of the suit land? It is not contested that the Plaintiff is in occupation of the suit land along with his family to date. And that the Plaintiff has made several developments thereon including constructing houses and farming. DW1 in his testimony described the occupation by the Plaintiff to the suit land to be forceful. DW2 stated that he could not take possession after purchase of the suit land because of the hostility he received from the Plaintiff who was already in occupation and he did not want to use force to evict him. It thus shows that the occupation, use and development of the suit land by the Plaintiff is without the permission of the Defendants, the same has been open, notorious and uninterrupted for a period in excess of 12 years hence adverse to the Defendant's title.

26. When did time begin to run for purposes of Adverse Possession? The Defendants contend that the suit land was registered in 1993 and since the suit was instituted only 11 years later the same was premature in respect to the Limitation of Actions Act. The Plaintiff however demonstrated through documentary evidence that the registration in 1993 was a re-registration after the initial parcel of land being parcel No. 164 which had been registered in 1977 was subdivided. This position was confirmed by DW1 in oral testimony. It thus follows that the instant suit was actually not premature at the time of its institution in respect to the time when the suit land was registered.

27. From my perusal of the title documents in respect to the original parcel 164, the 1st Defendant became registered in 1977. The said title was subdivided into 478 and 479 in 1987. Later parcel 479 was subdivided to yield 555 and 556. It is noteworthy that parcels 164, 479 and 556 were all registered in the name of the 1st Defendant. Parcel 556 was later sold to the 2nd Defendant in 2013. Having held that the evidence of the plaintiff that he occupied the land since 1970, is plausible, it then follows that the land between the years 1970 – 1977 (first registration) was crown or Government land that had not been adjudicated. It is trite that land Government land and or unadjudicated land are exempt from the doctrine of Adverse Possession. It then follows that time started running for purposes of adversity from 1977 and by the year 1989, title had been extinguished in favour of the Plaintiff. The 1st and 2nd Defendants therefore held the title in trust for the plaintiff at various times.

28. Did the 2nd Defendant acquire good title to the suit land? Having found that the Plaintiff was indeed in occupation of the suit land for a period in excess of 12 years in a manner that was adverse to the title holder it is evident that at the time the 2nd Defendant purchased the suit land it was already encumbered by an overriding interest in favour of the Plaintiff for Adverse Possession. He therefore did not acquire good title to the suit land. Indeed he acquired no title at all. He is a paper title holder holding the title in trust for the Plaintiff.

29. Whether the Plaintiff should be evicted from the suit land? Having held that the Plaintiff is entitled to the suit land by way of Adverse Possession, there is no need to determine this claim. This claim fails.

30. I have seen the contention by the Defendant's counsel that the Originating Summons should fail on account of the fact that it is worded or headed notice of motion. I have looked at the said pleading and from the prism of Article 159 of the Constitution, this Court shall uphold the substance rather than the form. The Constitution read together with the overriding objectives as enacted in the Civil Procedure Act obligate the Court to pay fidelity to substantive justice rather than procedural justice. I have reviewed the pleadings in totality and am satisfied that notwithstanding the procedural misadventure the Defendants had a clear notice of the case that was facing them and have applied their best evidence to counter the same.

31. The Court notes that the Plaintiff has no claim on the parcel No 478 as pleaded by the 2nd Defendant in his Counterclaim. The plaintiff has stated categorically that his claim is on the parcel 556 only. The 2nd Defendant stated in evidence that he thought the Plaintiff was also in occupation of parcel 478. The Court strikes out the claim in respect to parcel 478 for that reason.

32. Final orders;

- a. The Plaintiff's claim is allowed.
- b. It is hereby declared that the Plaintiff has established title on a portion of 9 acres in NYAKI/GIAKI-KIBURINE/556 by Adverse Possession.
- c. The 2nd Defendant is ordered to transfer 9 acres out of the suit land in the name of the Plaintiff within the period of 30 days in default the Deputy Registrar of the Court is ordered to execute all documents to effect order No b) above. The transfer shall in as much as possible cover the area that the Plaintiff is currently in occupation.
- d. The Land Registrar is mandated to dispense with the production of the Title and other documents that may ordinarily be necessary for registration of title.
- e. The Defendant's Counterclaim as stated in ELC No 105 of 2014 fails.
- f. Costs shall be borne by the Defendants.

Orders accordingly.

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

J. G. KEMEI

JUDGE

In the presence of;

C/A Mutwiri

Murango Mwenda for Plaintiff

Muchiri for 1st and 2nd Defendant