



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 187 OF 2011

HARUN MUTHOMI.....PLAINTIFF

VS

KIMATHI M'RIRIA.....1ST DEFENDANT

PAUL GITUMA.....2ND DEFENDANT

MUTUMA M'RIRIA.....3RD DEFENDANT

MURITHI M'RIRIA.....4TH DEFENDANT

KINOTI M'RIRIA.....5TH DEFENDANT

MWITI M'RIRIA.....6TH DEFENDANT

JUDGMENT

1. Vide the orders of the honourable Court issued on the 16/4/18 this suit was consolidated with ELC 18 of 2012, ELC No 187 OF 2011 being the lead file. ELC No. 18 of 2012 was treated as the Defendants' Counterclaim.

2. By a plaint dated 16/12/11 the Plaintiff claiming an ownership right over all that parcel of land known as NTIMA/IGOKI2004 herein referred to as the suit land sued the Defendants for trespass seeking the following reliefs;

(a) For order of permanent injunction restraining the Defendants either by themselves, their agents, employees, assigns or anyone claiming on acting on their behalf or on their behalf from trespassing, occupying, cultivation, building on or entering land parcel number NTIMA/IGOKI/2004 and in the alternative an order of eviction of the Defendants from land parcel number NTIMA/IGOKI/2004.

(b) Costs of the suit and interest at Court rates.

3. The Plaintiff claims that he is the registered and beneficial owner of the suit land and has always been in possession and occupation of the same. That the Defendants are brothers and they live on the parcel that borders the suit land. That the Defendants have encroached on a portion of the suit land and occupied it without a right and consent of the Plaintiff. The Plaintiff seeks to restrain the Defendants from further trespass on the suit land.

4. The Defendants in their defence deny the allegations made in the plaint and also filed ELC No.18 of 2012 in which they claim that they have been in occupation of the suit land since 1968 and their entire lives thereafter. That the remains of their parents were interred on the suit land. That their occupation of the suit land has been open exclusive and uninterrupted since 1968 and have made various developments thereon including construction of over 6 houses and planted more than 200 trees of coffee and eke a living out of the suit land.

5. In the Originating Summons in ELC No.18 of 2012 the Plaintiffs claim an ownership right to the suit land by way of Adverse Possession and has invited the Court to determine the following questions: -

a. Have the Plaintiffs occupied the land parcel No NTIMA/IGOKI/2004 for more than 12 years.

- b. Has the Plaintiff's occupation been open unhindered, notorious, undisturbed and uninterrupted for more than 12 years.
- c. Have the Plaintiffs been in occupation of the suit land since the year 1968.
- d. Have the Plaintiffs become entitled to the suit land by way of Adverse Possession.
- e. Has the Defendants ever occupied the suit land.

6. And he seeks the following orders: -

- a. A declaration that Julius Kimathi M'Riria, Julius Kinoti M'Riria Murithi M'Riria, Paul Gituma M'Riria and Mutuma M'Riria the Plaintiffs herein have become entitled by way of Adverse Possession to all that parcel of land known as L.R NTIMA/IGOKI/2004.
- b. An order for the rectification of the register and the said Plaintiffs be registered as sole proprietors of all that parcel of land known as L.R NTIMA/IGOKI/2004.
- c. An order that the Defendants herein do execute all the required instruments and/or documents to effect the transfer to the Plaintiffs of land parcel No L.R NTIMA/IGOKI/2004 and in default this Honourable Court to empower the Deputy Registrar to so execute the transfer instrument on its behalf.
- d. This Honourable Court do make further or other orders it deems fit and expedient to meet the ends of justice.
- e. Costs of this be borne by the Defendants.

7. The summons is premised on the following grounds;

- a. That the Plaintiffs have been in exclusive open and uninterrupted occupation of the suit land.
- b. That the Plaintiffs have made substantial developments on the suit land by building permanent houses and carries on farming on the land since 1968.
- c. That the Plaintiffs' have lived with their families on the suit land for a time running now to over 40 years.
- d. That the registration of the Defendants as the owner of the land is against the Plaintiff's proprietary interest by way of Adverse Possession.

8. The summons is supported by the affidavit of Julius Kimathi M'Riria one of the Plaintiffs who reiterates the contents of the summons on the face of it.

9. At the hearing, PW1, Harun Muthomi, testified that he is the registered owner of suit land. The Defendants are his neighbors who trespassed on his land in 2011 and constructed some structures but he is not aware who lives therein. He denies any graves or coffee trees on his land planted by the Defendants. He claims that the photos produced by the Defendants are of buildings erected on their own land and not on the suit land. He sought eviction orders against the Defendants and produced a green card to the suit land and demand letter dated 4/9/2011. He claims that the suit land is less than an acre therefore too small to accommodate all the structures shown on the photos.

10. DW1-Joseph Mutuma M'Iriria testified that he entered the suit land in 1960. That he was born there and his parents lived and died there. That all his siblings and their families have lived there all their lives, they farm on the land and raise their families and have always known the land to be theirs. That the acreage of the land they occupy is 2.5 acres whilst the Plaintiff is claiming 0.3 acres. He claims they cultivate on the entire land. That the Plaintiff is not known to them he has never occupied/farmed the land has just met him in Court.

11. DW2 – Julius Kimathi M'Iriria testified that he was born in 1972 and has lived on the suit land since birth with his siblings and their families. The sum total of land they occupy is 2.5 acres and there are no boundaries to show the land the Plaintiff is claiming to be his. He produced a bundle of photographs which he identified the old house to be their fathers house.

12. Orders for site visit were issued and report filed in Court thereafter the parties elected to file written submissions.

13. The report concluded that the 1st and 3rd Defendants are in partial occupation of the suit land. The other structures were neglected and no evidence of active occupation. There is no active farming ongoing on the suit land.

14. The Plaintiff in his submissions relied on the site visit report that shows that the structures on the suit land are of recent construction. He also faults the Defendants for not specifying who among them occupies the suit land. He claims that he holds an indefensible title to the suit land that is not tainted with fraud and therefore he is entitled to orders sought. He submits that the Defendants have not proved the requirements necessary for Adverse Possession.

15. The Plaintiff's claim is grounded on a proprietary right over the suit land for being the registered owner and claims to have purchased the same sometimes in 2011. He produced a green card in support of his claim as the registered owner. He claims to have always been in possession of the suit land until 2011 when the Defendants allegedly encroached on the suit land. He did not adduce any evidence to show

that he has been in possession of the suit land in form of any developments made thereon since he allegedly took possession. The Defendants on their part and in form of Counterclaim contend that they are entitled to the suit land by way of Adverse Possession having been in occupation of the suit land all their lives, that the land was initially owned by their parents who passed on, were buried on the suit land and the land was passed on to them. That it was subdivided among the sons of the family by their parents who proceeded to construct homes thereon which they have been living with their families. The Plaintiff's claim is that the suit land measures slightly less than an acre while the Defendants contend that the entire portion of land that they occupy as a family measures 2.5 acres in total. It appears that the suit land is a portion of the land that was initially occupied by the Defendants that would have been excised without their knowledge. The site visit report shows partial occupation of the suit land by the 1st and 3rd Defendants and no active farming taking place on the suit land as alleged by the Defendants. The report assessed the age of the buildings constructed the suit land to be of recent construction of possibly less than five years old. The Plaintiff claims that the Defendants have their own parcel of land that neighbors the suit land. There was no evidence of the alleged graves on the suit land in the site visit report.

16. The Defendants submitted that they are in occupation of the suit land as stated in the site report filed in Court. That neither the Plaintiff nor his predecessors have taken possession of the suit land. They asserted that their occupation has been open, continuous notorious and peaceful since 1970. They relied on case law; **Grace Kamene M'Berece Vs Joyce Rigiri W/O David Mbogori and Leonola Nerima Karani Vs William Wanyama Ndege (2012) ECLR** in support of their case.

17. Having considered the pleadings, the evidence of the parties, the Written Submissions and case law and all the material placed before me in the suit, the issues that fall for determination are;

- a. Whether the Defendants have occupied the suit land openly, peacefully uninterrupted and exclusively
- b. Whether the Defendants have trespassed onto the Plaintiffs land
- c. What orders should the Court grant
- d. Who meets the costs of the suit?

18. It is not in dispute that the suit land was registered in the name of the Plaintiff in 2005 having purchased it from the previous owner Hezekiah Gichuru. The Plaintiff produced a certified copy of the green card to support his ownership of the suit land. It is commonly accepted that the size of the suit land is 0.3 acres. The Parties are neighbours. The Defendants being brothers actually occupy the adjacent land that borders the suit land.

19. Adverse Possession in Kenya is underpinned by the provisions of sections 7, 13, 37 and 38 of the Limitations of Actions Act and section 28 (h) of the Registration of Actions Act.

20. In the case of **Kimani Ruchire –v– Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B**, where Kneller J. held that:

“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, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

21. Going by Para 19 and 20, a claim for Adverse Possession is supported by the following factors;

- a. Whether entry and continued occupation of the suit land is adverse to the person in respect of whom Adverse Possession is alleged.
- b. Whether the occupation is open, continuous, peaceful and uninterrupted.
- c. Whether entry and or occupation has not been disrupted in at least 12 years.
- d. Whether entry is permissive.

22. The Defendants have claimed that they have occupied the suit land for a period of over 40 years and that they have constructed 6 houses, 6 rental houses, planted 200 coffee bushes, trees grevilia, connected electricity and have all settled there with their families. That their parents and other relatives are buried on the suit land. DW1 led evidence that they live in the neighboring land which measures 2.5 acres. That they realized that they were occupying the Plaintiffs land when they received a demand letter to vacate. He admitted that the photographs which they produced in Court by and large refer to their 2.5 acre land and not the suit land which is 0.3 acres. He averred that the suit land is part of the 2.5 acres which is their family land. He admitted not knowing where exactly the 0.3 acres they claim to have established a right to Adverse Possession is. He stated as follows in evidence;

“the 0.3 acre land is part of 2.5 acres. I need to check it out. I do not know where the 0.3 acres is”

Equally DW2 stated that he was unsure of the location of 0.3 acres and which structures are located on 0.3 acres. He was also unsure if there are graves on 0.3 acres. He claimed that they only realized that they were occupying the Plaintiffs land on receipt of the demand letter in

2011 from the Plaintiff's lawyers to vacate.

23. The Plaintiff on the other hand testified that he acquired the suit land in 2005. That the Defendants trespassed on to the land in 2011 where they constructed two houses; one semi-permanent and another a two roomed stone house. He testified that someone lives on the land sometimes. This evidence agreed with the site report which stated that the 3rd Defendants son sometimes uses the house. He stated that there are no graves on the suit land, this agrees with the site report and contrasts the report of the Defendants who claim that the suit land has graves of their parents and relatives dotted on the suit lands. He stated that the pictures produced by the Defendants refer to their 2.5 acres land and not the suit land. This evidence is consistent with the evidence of DW1 when he agreed that the pictures produced relate to their 2.5 acres of land and not that of the suit land. The graves, the timber structures and the coffee are therefore found to be on the Defendant's land and not the Plaintiffs land.

24. The above evidence cast doubt on the Defendants claim that they have been on the land since 1968. Occupation is a question of fact. The Defendants have not countered the evidence of the Plaintiff that they trespassed on to the land in 2011. The site report described a stand alone 2 roomed houses that is about 5 years old. The timing or age of the house coincides with the evidence of the Plaintiff that the Defendants trespassed onto his land around 2011. The report states that even then the houses seem not to have been used of late as seen by the undergrowth and neglect in the structures on the suit land.

25. It is also not in dispute that the Plaintiff became registered owner of the suit land in 2005. There is no evidence that the Plaintiff has been disposed of possession of the land nor has he relinquished possession of the land. In accordance with section 38 of the Limitation of Actions Act, adverse is claimed against the registered proprietor of land. Taking that the Plaintiff became registered owner in 2005, the suit was filed in 2011, 7 years later. The statutory time for claiming Adverse Possession has not matured. The fact that the Defendants did not know that they are occupying the Plaintiffs land cannot accord them Adverse Possession because of the absence of animus possidendi that is the right to occupy the land adverse to the rights of the owner. They have not asserted a right that is in conflict or adverse to the Plaintiff.

26. The totality of the evidence adduced by the Defendants is shaky and short of the requirement to proof Adverse Possession. The Court finds that the Defendants have not proved that their occupation of the land is adverse to the Plaintiff.

27. In respect to issue No 2, trespass is defined as the Trespass is defined as unlawful act committed against the person or property of another especially wrongful entry of another's land. See **Black's Law Dictionary, 10th Edition at Page 1642.**

28. In the case of **Entick Vs Carrington (1765)** Lord Camden CJ had this to say:-

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave”.

29. The Plaintiff has led evidence that the Defendants trespassed onto his land in 2011 and constructed structures thereon which though sometimes occupied was aware of the person who lived therein. The Defendants have not controverted this evidence save to state that they were not aware that they were occupying the Plaintiffs land. They admit that the land they seem to claim Adverse Possession is actually their 2.5 acres of land as admitted by DW1 when he stated that the photographs refer to their own land. The site report show that the Defendants deserted the structures on the land leaving neglected and deserted structures, an old motor vehicle and dump site and unkempt compound with long grass undergrowth. It is not known when they did so.

30. Section 24 of the Registered Land Act vests in the registered owner the absolute ownership of the land together with all rights and privileges thereto. Section 26 mandates the Courts to take a certificate of title as the prima facie evidence that the person named therein is the absolute and indefeasible owner of the land. Section 25 provides that the rights of the registered owner shall not be liable to be defeated except as provided in the Act.

31. In this case the Court finds that the Plaintiff is the registered owner of the land and is entitled to protection of the law from trespassers. The Court finds that the Defendants are or have been in trespass of the Plaintiffs' suit land.

32. In conclusion, based on the evidence placed on record it appears that the Defendants indeed have their own parcel of land that neighbors the suit land which has been in occupation by the Defendants' family for years however either due to lack of occupation of the suit land and possibly due to lack of proper demarcation of the suit land the 1st and 3rd Defendants were allocated portions of land on the suit land in which they constructed their houses in the mistaken belief that it belonged to their family. The site visit report does not support the Defendants claim of over 40 years occupation.

33. The claim for Adverse Possession cannot stand thus the counter claim is dismissed and the Plaintiff's claim is allowed.

34. **Final orders;**

(a) The Counterclaim is dismissed while the Plaintiffs claim succeeds.

(b) It is hereby ordered that a permanent injunction restraining the Defendants either by themselves, their agents, employees, assigns or anyone claiming on acting on their behalf or on their behalf from trespassing, occupying, cultivation, building on or entering land parcel number NTIMA/IGOKI/2004.

(c) The Defendants are hereby ordered to vacate the suit land forthwith and in default they shall be evicted as provided under section 152 G of the Land Act

(d) The Defendants shall meet the costs of the suit.

Orders accordingly

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

J G KEMEI

JUDGE

In presence of;

Mutuma for Plaintiff

Ms. Mbijwe for 1st to 6th Defendants