



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 09 OF 2018 (O.S.)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22, SECTION 7, 37 & 38

AND

IN THE MATTER OF LAND REGISTRATION ACT (NO. 3 OF 2012) AND LAND ACT (NO. 6 OF 2012)

AND

IN THE MATTER OF AN APPLICATION BY LOISE MUTHONI NJAGI UNDER

THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA THAT SHE BE

REGISTERED AS PROPRIETOR OF PART MEASURING APPROXIMATELY

4.75 ACRES OR THEREABOUT OF LAND PARCEL NO. MAGUMONI/THUITA/1318

AND

FOR A DECLARATION TO THE LAND REGISTRAR UNDER SECTION 24 AND 28 OF

LAND REGISTRATION ACT (NO. 3 OF 2012) TO REGISTER THE APPLICANT AS THE PROPRIETOR OF

PART MEASURING APPROXIMATELY 4.75 ACRES OR THEREABOUT OF LR NO. MAGUMONI/THUITA/1318

LOISE MUTHONI NJAGI.....PLAINTIFF

VERSUS

MARGARET CIAMBAKA MUGAMBI.....DEFENDANT

JUDGMENT

1. The Plaintiff came to court via OS dated 18/9/2018 and filed on 19/9/2018. The Plaintiff seeks determination of the following questions;

1. **Whether** the plaintiff has acquired absolute title of part measuring approximately 4.75 acres of land parcel number LR Magumoni/Thuita/1318 by way of adverse possession.

2. **Whether** the plaintiff is entitled to be registered as the absolute proprietor of part measuring 4.75 acres of LR Magumoni/Thuita/1318.

3. **Whether** the plaintiff and her children have been in actual possession and occupation of LR Magumoni/Thuita/1318 for over 50 years.

4. **Whether** the occupation by the plaintiff and her children of LR Magumoni/Thuita/1318 was on any express/implied authority from the defendant.

5. Whether the occupation by the plaintiff of LR Magumoni/Thuita/1318 has been open and uninterrupted for a period in excess of 12 years.

6. Whether the defendant has taken any step whatsoever through a demand notice, demanding the plaintiff vacate LR Magumoni/Thuita/1318.

7. Whether the plaintiff has expressly developed the 4.75 acres of land on parcel Magumoni/Thuita/1318 and has thereon a home, sons' homes, cow sheds, tea plantations, trees, crops and napier grass.

8. Whether the plaintiff has an overriding interest of part measuring 4.75 acres of Magumoni/Thuita/1318.

9. Whether the Plaintiff has in any event acquired by way of adverse possession of 4.75 acres of the land parcel number LR Magumoni/Thuita/1318.

10. Whether the defendant has lost her legal right and authority by operation of Section 7 of the Limitation of Actions Act to claim from the plaintiff the part 4.75 acres of Magumoni/Thuita/1318 which the plaintiff has been in occupation openly, uninterrupted and without authority of the defendant for a period in excess of 12 years.

11. Whether the Plaintiff has acquired absolute ownership of part measuring 4.75 acres of LR Magumoni/Thuita/1318 or thereabouts while the defendant has lost ownership of the same by operation of the law.

12. Whether the Plaintiff is now entitled to be registered as the legal proprietor of the 4.75 acres of Magumoni/Thuita/1318 which the plaintiff has been in occupation of with her children all their lives.

13. Whether the defendant should be ordered to execute all necessary documents to survey and effect the transfer including applications for consent and transfer for part of 4.75 acres of LR No Magumoni/Thuita/1318 to the plaintiff.

14. Whether the plaintiff is entitled to costs of the suit.

2. The Originating Summons is supported by the affidavit of Loise Muthoni Njagi sworn on 18/9/2018 which is reproduced in full here below. Any spelling or other mistakes are solely ascribable to the plaintiff or her advocates. The summons states:

1. The parcel LR Magumoni/Thuita/1318 is registered in the name of the defendant which registration was entered in 1993 when the plaintiff had already been in occupation of a part, 4.75 acres, for 24 years without her license or authority and the defendant did not take any steps to challenge the occupation of the plaintiff even after her registration as the owner.

2. The suit property measures about 5 acres and the defendant has her homestead in only about 0.25 acres while the plaintiff occupies the balance with her children where they also have homesteads.

3. She came into occupation after marriage and her late husband built for her a house on the suit property in 1963 and she has lived there and given birth to her children who are all grown-ups presently.

4. She and her sons have been in occupation of the suit property since childhood as her eldest son was born in 1969 and the youngest in 1985 which is well in excess of 12 years.

5. She has been living on and using the suit land openly, unhindered, continuously, without interruption and without authority of the defendant for over 50 years and the defendant has never taken any steps to have them evicted from the land and all their neighbors know them as the owners thereof.

6. She claims the part measuring 4.75 acres of the suit property.

7. They, she and her 5 sons, have extensively developed the portion claimed with homesteads, cow sheds, plantations, trees, crops, tea and napier grass. Her husband's grave is also on the land.

8. The defendant should be ordered to execute documents to survey and effect the transfer to the plaintiff and in default, the executive officer to be authorized to execute the same on behalf of the Respondent.

DEFENDANT'S CASE

3. The defendant filed a Replying Affidavit on 17/10/2018 and the same was sworn on 15/10/2018. Any spelling or other mistakes are ascribable to the defendant and her advocate. The affidavit states:

1. The plaintiff is her co-wife and the defendant is the first wife to their deceased husband Njagi Njuki.

2. Prior to his death, her husband was ordered by the PM Court at Embu in Civil Case No 209 of 1992 to subdivide land parcel Magumoni/Thuita/264 into three portions.

3.One portion of 5 acres was transferred to the plaintiff, another 5 acres was transferred to the defendant and the balance was to remain in their husband's name. The subdivision was done resulting in parcels Magumoni/Thuita/1318, 1319 and 1320.

4.The defendant was registered as the owner of parcel 1318, while the plaintiff received parcel 1319 and their husband retained parcel 1320.

5.Prior to the said subdivisions, they were living and cultivating on the parcels as they do to date.

6.After the subdivision, a portion of the land where the plaintiff lives and cultivates fell on part of 1318 as well as 1319 and the same case applied to the defendant and her children.

7.They agreed as a family that they continue to use the lands as they were used to in order to maintain peace and harmony. This meant that the plaintiff continued to use part of the defendant's land with her permission and vice versa.

8.The plaintiff is trying to take advantage of the defendant's advanced age and generosity to acquire the defendant's land.

9.The plaintiff does not occupy 4.75 acres but a portion much less than that, again, with the defendant's permission.

10.The defendant prays that the court does order each party to use their respective 5 acres as per the earlier judgment of the court.

REPLY BY THE PLAINTIFF

4. The Plaintiff filed a further supporting affidavit on 8/11/2018 and the same was sworn on even date. Any spelling or other mistakes are ascribable to the plaintiff and her advocate. The affidavit states:

1.It is true the defendant is her co-wife and they were both married to the late Njagi Njuki.

2.The deceased owned parcel Magumoni/Thuita/264 in which he had built homes for both of them and let them cultivate their respective areas. The said homes were a distance apart and did not share anything including a gate, houses, compound, crops or any amenities. This position became stirred when the defendant's house started fighting the deceased in court.

3.There was subdivision of the parcel 264 after the court order which the defendant and her children rushed to enforce without involvement of the plaintiff's family.

4.The defendant transferred parcel 1318 to her name despite the fact that the plaintiff occupied a large part thereof, 4.75 acres.

5.The defendant also owns LR Magumoni/Thuita/1513 measuring over half an acre which resulted from the subdivision of Magumoni/Thuita/1320. The **remaining portion from parcel 1320 is still in the name of the deceased.**

6.It is not true that parcel 1319 was transferred to the plaintiff as the same is still registered in the name of their late husband.

7.It is true that prior to the subdivision, they were all living and cultivating as per the present.

8.The defendant and her son influenced the subdivision to force their husband, who lived with the plaintiff, to pull down their house, cut down their crops and move to a new place which was not necessary. This caused acrimony and the district surveyor confirmed so in a letter to the court dated 26/5/1993.

9.As matters stand, the defendant has 2 pieces of land from their husband registered in her name while the plaintiff and her children have none while they were both married to the deceased and both bore him 5 sons.

10.It is untrue that the plaintiff is greedy as the defendant is the one who has land in her name and also was the author of land battles between her sons and the deceased that caused the deceased's health to deteriorate.

11.It is not true that the plaintiff occupies 4.75 acres of parcel 1318 and she invited the court and a survey to assess the ground.

12.It is not possible to order each party to occupy 5 acres as the defendant caused subdivisions in a skewed manner and the plaintiff has no land in her name and this will cause the plaintiff to lose more than 50 years worth of developments. The defendant proposes so in bad faith.

13.The judgment in Embu PMCC 209 of 1992 has been overtaken by events as it was not executed within 12 years of its delivery and the averments based on the same are baseless.

DEFENDANT'S FURTHER REPLY

5. The defendant filed a Further Replying Affidavit on 30/11/2018 and the same was sworn on 27/11/2018. Any spelling or other mistakes are ascribable to the defendant and her advocate. The affidavit states:

1. **Parcel** 1318 was given to her by the honourable court after the subdivision of parcel 264.

2. **The** plaintiff refused to execute the necessary documents to have parcel 1319 placed in her name.

3. **Parcel** 1513 is a resultant parcel of parcel 1320 which was registered in her name after a succession case following the death of her husband. The case was Embu PM Succ. 168 of 1993. The plaintiff was to receive the other resulting parcel, number 151, but refused to execute the documents to have it. **4. She** had annexed the survey by the district surveyor which was done on 12/5/1993 and so his alleged letter of 26/5/1993 does not make sense.

5. **The** plaintiff is supposed to receive the remaining parcels in her husband's name but has refused to execute documents.

6. **The** judgment of Embu in PMCC 209 of 1992 does not arise as she was registered owner of parcel 1318 pursuant to the same.

7. **The** plaintiff's suit should be dismissed with costs.

PLAINTIFF'S WRITTEN SUBMISSIONS

6. The Plaintiff filed submissions on 12/2/2019. Any spelling or other mistakes are ascribable to the plaintiff and her advocate. The submissions state as follows:

1. **After** the land was subdivided, the surveyor sought to excise 5 acres in favour of the defendant which 5 acres included a large portion of the plaintiff's developments. The defendant did not deny that the plaintiff occupies parcel 1318 but only disputed the size occupied. However, the defendant did not bring any evidence to show that the area occupied by the plaintiff is less than 4.75 acres. The photographs exhibited cannot be for a small area.

2. **The** award from the arbitration tribunal, which was confirmed by the court in Embu case 209 of 1992 on 2/4/1993 is over 25 years old and the defendant cannot reap the fruits thereof.

3. **The** plaintiff was in occupation of the land even before the same was registered to the defendant. No form of permission would have been sought from the defendant as the plaintiff was already on the land.

4. **They** pray the court does find that the plaintiff has become entitled by adverse possession to the property claimed.

7. The plaintiff relies on the following cases:-

a) Chevron K Ltd(formerly Caltex Oil K Ltd) vs Harrison Charo wa Shutu (2016): In this case, the appellant claimed that the respondent had trespassed on a property which they leased in 1994 but they filed suit in 2008. The respondent claimed adverse possession citing open and continuous use spanning 45 years after his father was allotted the land. The appellant's suit was dismissed at the ELC and the respondent's claim for adverse possession was upheld. The Court stated that by building structures without permission, the respondent manifested a clear mind of his intention to treat the property like his own and by the time the appellant instituted suit, its title had already been extinguished as 12 years had passed between their registration as owner and filing of their suit. The Court of Appeal upheld the decision of the ELC to declare the respondent as owner and have the land transferred to him.

b) Ruth Wangari Muigai versus Edward Njuguna MWangi (2015)eKLR. In this case, the appellant was aggrieved by the High Court declaring the respondent as the registered owner of the suit land by adverse possession. The respondent had filed the suit having purchased the suit property in 1974 from the appellant's husband and taken possession immediately. The Control Board consent and the possession then became adverse to the owner. The Court of Appeal upheld the decision of the High Court in support of the claim for adverse possession.

c) Sammy Likuyi Adiema versus Charles Shamwati Shisikani (2014)eKLR: In this case, the appellant had sued the respondent seeking his eviction from the suit land of which the appellant was the registered proprietor. The respondent claimed to have purchased 2 acres from the suit land and been in possession of the same since 1984. The respondent's claim succeeded and the appellant was ordered by the High court to transfer the portion to the respondent. The Court of Appeal stated that due to lack of Land Control Board consent, the possession of the respondent became adverse. There was no evidence of any interruption of the occupation by the respondent and no evidence that the appellant ever entered the premise. The appellant did not demonstrate dispossession. The court also said that there was a constructive trust created when the respondent was allowed to be in possession and the portion he seeks was held in trust for him by the registered owner.

d) Githu vs Ndeete (1984)KLR. The Court of Appeal held that mere change of ownership which is occupied by another person adversely, does not interrupt that person's adverse possession. The Court upheld the claim for adverse possession.

DEFENDANT'S WRITTEN SUBMISSIONS

8. The defendant filed written submissions on 28/2/2019. Any spelling or other mistakes are ascribable to the defendant and her advocate. The reiterate the contents of the pleadings and submit that;

1. **The** issue in dispute is whether the occupation of the suit land parcel 1318 by the plaintiff has been with the permission of the defendant.

2.The plaintiff used to cultivate and live on a portion of parcel 264 in the year 1993. The defendant used to cultivate and live on parcel 1319 which belongs to the plaintiff. The occupation by the plaintiff of parcel 1318 is therefore with permission of the defendant which was given for the sake of harmony in the family.

3.The plaintiff seeks to own a bigger share of the original property parcel 264 by owning parcel 1319 (5 acres) and also 4.75 acres she claims from parcel 1318.

4.It is untrue that the defendant is the cause of all problems as the defendant would have evicted them way back in 1993 if she was not generous.

5.The plaintiff did not prove that she does occupy 4.75 acres and burden of proof to do so lay with her. She should have called an independent witness such as a surveyor. Her prayers cannot be granted as she is not precise. She cannot occupy the entire portion as claimed because that insinuates that the defendant and her sons live on 0.25 acres.

6.She submits that the plaintiff was never in possession of any part of the suit land. Any occupation with consent of the owner does not support the claim. The plaintiff has failed to prove her case on a balance of probabilities. The consent in this case was implied.

7.The plaintiff ought to be satisfied with her parcel number 1319 which is the same acreage as the defendant's parcel.

9. The defendant relies on the following cases:

a) Wangari Waithanje and 2 others vs Thathi Francis Muruaria (2017)eKLR: In this case, the plaintiffs claimed that the suit land was registered to the defendant, who is their relative, due to the advanced age and blindness of the actual owner, also a relative. Despite that they had lived on the property since 1966. The defendant contended that it was he who had purchased the property and not the other relative who was unemployed. He had been registered as proprietor since 1966 and had invited the plaintiff and her husband to live on the land in 1980. The court doubted the defendant's evidence as the 1st plaintiff's husband had died in 1967 while a resident of the property. A neighbor also testified that the plaintiffs moved into the suit land in 1966 but the defendant had never lived there. The court deemed the rights of the defendants had extinguished in 1978. The court ruled in favour of the plaintiffs on adverse possession.

b) Mwinyi Hamisi Ali vs AG and another (1997)eKLR (Court of Appeal): In this case, the land in issue was under RTA which required the surrender of a lease in order to terminate interest of the lessee. The plaintiff, claiming land as an allottee, was irregularly allotted the land as it had not been surrendered as per law. Therefore, the court held, his allotment never crystallized and his claim could not succeed.

ANALYSIS AND DETERMINATION

10. The parties herein do not dispute that they were co-wives, both married to the late Njagi Njuki. They do not dispute that he was the owner of parcel number Magumoni/Thuita/264. They do not dispute that there was a court case and in the end, the late Njagi Njuki was ordered by the Embu Magistrates Court in CMCC 209 of 1992 to divide the land into 3 portions such that the house of the first wife/respondent would get 5 acres, the house of the 2nd wife/applicant would get 5 acres and the late Njagi Njuki would retain the balance. This subdivision was done resulting in the creation of parcels Magumoni/Thuita/1318, 1319 and 1320. Parcel 1320 was later subdivided again into parcels 1513 and 1515. 1513 was registered in the name of the defendant. 1515 remained in the name of the late Njagi Njuki and still bears his name to date. Parcel 1319 remains in the name of the deceased as well. Parcel 1318 was registered in the name of the defendant. The parties also do not dispute that prior to the sub-divisions, everyone was living and cultivating in the same positions they occupy to date.

11. The point of departure which forms **the first issue**, is as to whether the applicant has acquired adverse possession of the portion measuring 4.75 acres of parcel 1318 registered to her defendant co-wife, who in turn states that she gave permission for the applicant to be there, as parcels 1318 and 1319 are said to overlap.

12. The court notes that there was no surveyor's report tabled to show the court the positioning of the parcels and to confirm if they indeed overlap as claimed by the respondent. The respondent tabled a mutation form dated 12/5/1993 which includes some sketch maps of the properties. This mutation form was not produced by the maker as no one testified before the court in this respect. However, I do note that the back of the sketch map bears a note by the District Surveyor to the effect that "the registered area is more than the computed area by 0.404 Ha". None of the parties made it known if this issue was ever taken forward to be handled by the Land Registrar. Since the evidence of the potential overlap of plots 1318 and 1319 was not tabled and adequately canvassed, I believe the court would be upright at this juncture, to assume that the parcels are distinct.

13. The first issue to be determined is whether the plaintiff was in occupation of parcel 1318 with the permission of the defendant or adversely so.

Section 38 of the Limitation of Actions Act, provides:-

"...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) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."

14. The Court of Appeal in the case of M'MBAONI M'ITHARA V JAMES MBAKA [2019] EKLK stated that;

“In Kweyu Vs Omutut [1990] KLR 709 this Court (Gicheru JA stated at page 716 as follows:-

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality is). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”

15. Ouko JA in MTANA LEWA V KAHINDI NGALA MWAGANDI [2015] EKLK stated;

“In terms of Sections 7, 9,13,17,37 and 38 of the Limitation of Actions Act, title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”

16. The ELC at Nairobi (Eboso J) in the case of REBECCA WANGANGA V JANE WANJIRU NJOROGE & 3 OTHERS [2018] EKLK (O.S.) considered somewhat similar circumstances and stated;

11. “The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted...

“In summary, the court’s finding is that the plaintiff’s entry into Parcel Number Kiambaa/Kihara/ 508 was by virtue of being George Wanganga’s second wife. The 1st defendant was George Wanganga’s estranged first wife. At the time George Wanganga died in 2006, he had asserted his title to the said land as beneficial owner of the property through Nairobi High Court Civil Case Number 791 of 2004. As a widow of the late George Wanganga, the applicant is at liberty to pursue the claim of her deceased husband on behalf of the estate. Time in respect of the plaintiff for purposes of acquisition of title under the doctrine of adverse possession started running in 2006 when George Wanganga died. She brought this suit in 2008 before the limitation period of 12 years had lapsed. Consequently, the orders sought in the originating summons herein are declined. The suit is accordingly dismissed with no order as to costs.”

17. The last quoted case above is almost similar to our present case and I am inclined to agree with the reasoning of the Learned Judge on computation of time for the adverse possession claimed.

Prior to the death of their husband, the plaintiff herein had been occupying that area as given to her by her husband, which fact is not in dispute. The said portion, now called parcel 1318, was registered to the defendant on 17/12/1993 at which point I believe the plaintiff’s occupation then became adverse to the defendant. This suit was filed on 19/9/2018 which was almost 25 years since the defendant became the registered owner.

18. However, the defendant claims that there was no adverse possession as she gave the plaintiff permission to use the land due to an overlap. I have already expressed my opinion that no overlap was proved and therefore the explanation by the defendant as to why the plaintiff was on her property lacks support. On a balance of probabilities, the defendant did not demonstrate that she gave any permission for the plaintiff to stay on the land. I am, therefore, of the view that the plaintiff has indeed proven her case for adverse possession of parcel Magumoni/Thuita/1318.

19. The second issue is whether the plaintiff ought to be registered as the owner of 4.75 acres of parcel 1318. Given the totality of the above narration, I find that the answer should be in the affirmative. Additionally, the defendant has not shown that she or her children have any developments on land parcel 1318 and are therefore not likely to be prejudiced by this order. In any event, the parcel 1319 still exists in the name of the deceased as does parcel 1515 and both are capable of being distributed to the defendant in a succession proceeding. The defendant may need to persuade the succession court that the said parcels of land should be distributed to her so that her co-wife, the plaintiff, does not benefit inequitably to her detriment.

20. In the circumstances, the plaintiff’s suit succeeds and I issue orders in the following manner:

a) As the plaintiff's case for adverse possession has succeeded, I declare that **she is entitled** to be **registered owner of 4.75 acres** out of Land Parcel No. **MAGUMONI/THUITA/1318**.

b) The defendant is ordered to **effect the transfer** of 4.75 acres out of Land Parcel No. Magumoni/Thuita/1318 to the plaintiff and in **default the Deputy** Registrar of this court is authorized to execute all documents necessary to effectuate the implementation of this order.

c) As the parties are spouses of one deceased husband, this court issues no order as to costs and parties will bear their own costs.

Delivered in open Court at Chuka this 22nd May, 2019

in the presence of:

CA: Ndegwa

Dennis Muthomi h/b Joe Kathungu for the defendant

P. M NJORGE,

JUDGE