



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 324 OF 2017(OS)

MARY IGOKI MURUARUCHIU.....PLAINTIFF/APPLICANT

VERSUS

JOHNSON RWIGI (sued as the legal Representative of

M'MURIANKI M'MUGWIKA Deceased).....DEFENDANT/RESPONDENT

JUDGMENT

1. On the 19/12/2017 Mary Igoki Mutuaruchiu (hereinafter called the Plaintiff) moved the Court under Order 37 rule 7 of the Civil Procedure Rules, Sections 7, 16,17 and 38 of the Limitations of Actions Act, and sought the determination of the following questions;

- a) Whether the Plaintiff has been in open continuous and exclusive possession of the whole of L.R NO. IGOJI/KINORO/1043 measuring 0.052 ha or thereabouts for over 12 years.
- b) Whether the Plaintiff has become entitled to the said L.R NO. IGOJI/KINORO/1043 measuring 0.52 ha.
- c) Whether the Plaintiff should be registered as the owner of the suit.
- d) Whether the Deputy Registrar and/or Executive officer of this honourable Court should sign all the necessary documents to transfer the said 0.52 ha of land comprised in or otherwise described as L.R NO. IGOJI/KINORO/1043 to the Plaintiff in default of the Defendant so signing.
- e) Whether the Defendant should pay the Applicants costs hereof.

2. The application is supported by the Applicants supporting affidavit filed on the 19/12/2017.

3. The Defendant filed a Memorandum of Appearance on the 18/1/2018. However he failed to file a Replying affidavit notwithstanding service of summons. He was served on the 17/1/18 and 4/6/18. On the 13/6/18 the Plaintiff filed a request for judgement against the Defendant for failing, neglecting and or refusing to file a reply to the Originating Summons. The matter being a land dispute, the suit was then set down for formal proof.

4. On the 18/9/18 the Court directed the Plaintiff to serve the Defendant who was accordingly served with the hearing notice scheduled for the 18/10/2018. He was served but neglected, refused and or ignored to file any reply nor appear for the hearing. The Court being satisfied that the Defendant was duly served proceeded with the hearing of the suit on the 18/10/18.

5. At the hearing, the Plaintiff informed the Court that on 2/5/89 she entered into a handwritten sale agreement with M'Muruanki M'Mugwika, now deceased in respect of the suit land and took possession upon payment of the purchase price. In furtherance of the said agreement of sale a formal sale agreement was executed by the parties on 7/7/89 before an advocate namely B.G. Kariuki for the sale of the suit land measuring 0.052 ha. The purchase price was Kshs 20,000/-. She produced the said original sale agreements marked PEX No 1 and 2. She also produced a certificate of search dated 31/7/17 and the original title deed in respect to the suit land in the name of the said M'Muruanki M'Mugwika registered on 25/10/1983. The Plaintiff informed the Court that the reason why the transfer of the suit land was not completed was because M'Muruanki M'Mugwika had explained to her that he had misplaced the original title Deed. The title was however later found and the said M'Muruanki M'Mugwika handed it over to her for safe custody pending the formalities of transfer, which transfer was not to be as fate would have it, he died 29/2/2008.

6. The Plaintiff informed the Court that having taken possession in 1989 she proceeded to develop the suit land and deal with it as of right by

building 3 semi- permanent houses, practice subsistence farming *inter alia* and she is still in occupation to date. In 1994 she had purchased another parcel of land L.R NO. IGOJI/KINORO/1076 from the deceased which was finalized and transferred to her name. This land borders L.R NO. IGOJI/KINORO/1043. On it, she has constructed a permanent shop, butchery, and a semi-permanent house and ancillary structures thereto.

7. Upon the death of the said M'Muruanki M'Mugwika, the **Johnson Rwigi** (son of M'Muruanki M'Mugwika), the Defendant herein was appointed his legal representative of his estate vide HCCC Succ. Cause 638 of 2009 wherein the suit land is amongst the assets listed for distribution to the beneficiaries of the estate of M'Muruanki M'Mugwika to her exclusion despite her interest in the land that has accrued by way of long occupation since 1989. She objected to the petition and sought a stay of the said proceedings pending the determination of the question of Adverse Possession in this case. She produced an affidavit in support of confirmation of grant dated 29/8/2017 and marked PEX No 7. She also produced an affidavit expressing the said protest and marked PEX No 8. She demonstrated to the Court that arising from the said protest and the application of stay of proceedings in Succ. Cause 638 of 2017, the Defendant is well aware of the existence of this case as he did acknowledge it in his replying affidavit dated 6/2/18. In any event her lawyers on record inquired through a letter dated the 11/4/18 from the Respondent's lawyers in the succession suit Messrs Okubasu & Munene Advocates who did not respond despite acknowledging the said letter on 12/4/18.

8. The Plaintiff concluded her case and elected not to file any written submissions.

Determination

9. Having evaluated the Pleadings filed and the evidence led at the hearing of the suit, the key question for determination is whether the Plaintiff has proved a claim of Adverse Possession over the suit land.

10. The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya. I will highlight some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012;

Section 7 states that

“An action 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”

Further in Section 13

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, Section 38(1) and (2) states;

“(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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

11. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

12. Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

13. In **Kasuve Vs Mwaani Investments Limited & 4 Others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

14. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this particular case evidence was led by the Plaintiff that she purchased the suit land and upon payment of the purchase price she was put in possession by the Purchaser in 1989. The registered owner therefore was dispossessed of the suit land and according to the evidence by the Plaintiff no one has dispossessed her nor has she handed over possession. It is her evidence that her possession has neither been broken nor interrupted. In the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)**:

“...the possession must not be broken, or any endeavours to interrupt it.”

15. In the case of **Wanyoike v Kahiri [1979]** KLR at page 239 Justice Todd (as he then was), held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase. In the case at hand the Plaintiff pleaded under para 2 of her supporting affidavit that she took possession upon payment of the consideration agreed. There is no contrary evidence that has been laid to show that the full purchase price was not paid. On a balance of probability, this evidence is taken to be credible.

16. Going by the provisions of Section 16 of the Limitations of Actions Act aforesaid, the Defendant became the administratrix of the estate of the deceased vendor on the date of his demise. The question then is what did he do to dispossess or ward off the Plaintiff upto and including the time of filing this suit. From the evidence on record there is none. Conversely the question could be posed as what could the Defendant have done to prevent time from running? In the case of **Joseph Gahumi Kiritu Vs Lawrence Munyambu Kabura CA No 20 OF 1993** Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in **Githu Vs Ndeete** is important and deserves to be read in full.Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.” (Emphasis is mine).

17. There is no discernible action on the part of the Defendant’s father or the Defendant to stop time from running. From the evidence time started running in 1989 and by 2001 by which time, the Plaintiff had been in occupation of the suit land for a period of 12 years and in accordance with section 7 of the Limitations of Actions Act, the right of Adverse Possession had accrued. It is in evidence that the seller of the land died in 2008 by which time Adverse Possession had accrued in favour of the Plaintiff and the title had been extinguished.

18. The Plaintiff led evidence that she has been in exclusive control of the suit land and demonstrated her *animus possidendi* in developing the suit land through construction of the semi-permanent houses and practicing subsistence farming on the suit land as though it was as of right. That she has done this since 1989 to date openly and without interruption by anyone, least of all, the seller and his family is not under challenge.

19. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the Defendant’s father had knowledge of the open and exclusive possession of the suit land by the Plaintiff.

20. The Plaintiff has led evidence that the original title was put in her safe custody by the Respondent’s father indicating that the intention of the parties was that the land was to be transferred to the Plaintiff in due course except for the death of the Respondent’s father. The common intention of the parties is exhibited by the Vendor handing over title to the Purchaser. The formalities may not have been completed but the intentions of the parties are clear from their conduct and evidence.

21. 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 a matter of legal conclusion to be drawn from the findings of facts” **Kweyu v Omuto, C A Civ Appeal 8 of 1990** (as yet unreported). This Court is satisfied that the Plaintiff has proved Adverse Possession and her case is for granting. The title of the suit land is being held in trust for the Plaintiff.

22. The totality of the evidence above is that;

a) The Plaintiff has been in open continuous and exclusive possession of the whole of **LR NO IGOJI/KINORO/1043** measuring 0.052 ha or thereabouts.

b) The Plaintiff has established title in the **LR NO IGOJI/KINORO/1043** by way of Adverse Possession.

c) The Plaintiff shall be registered as owner of the **LR NO IGOJI/KINORO/1043** forthwith and in default the Deputy Registrar of this Court is mandated to execute all such requisite documents to effect the transfer.

d) To meet the ends of justice, the Land Registrar is mandated to dispense with the production of the original title deed in default of the production by the said Defendant.

e) The Plaintiff shall have costs of the suit.

Orders accordingly.

SIGNED AT MURANG'A THIS 8TH DAY OF MAY, 2019.

J G KEMEI

JUDGE.

DATED, DELIVERED AND SIGNED AT MERU THIS 22ND DAY OF MAY, 2019.

L N MBUGUA

JUDGE.