



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAIROBI

CASE NO. 365 OF 2014

(FORMERLY HCC NO. 1240 OF 2001 (OS))

RAVJI KARSAN SANGHANI.....PLAINTIFF

VERSUS

PETER GAKUNU.....DEFENDANT

J U D G M E N T

1. The Plaintiff instituted the instant suit vide an Originating Summons dated 25th July 2001 filed in court on the same day. He claimed that he had become entitled to the Defendant's parcel of land known as L.R. No. 209/11091 (hereinafter referred to as "the suit property") situated within Nairobi by way of adverse possession and prays for orders that:-

a. The Plaintiff be declared to have become entitled by adverse possession of over twelve (12) years all that piece or parcel of land registered under the Registration of Titles Act (Chapter 281 of the Laws of Kenya) and comprised in Title Number L.R. No. 209/11091 and situate in the city of Nairobi;

b. The said Plaintiff be registered as the sole proprietor of the said piece or parcel of land namely L.R. No. 209/11091 in the place of the above named Peter Gakunu in whose favour the said parcel of land is registered.

c. The Registrar of this honourable court do execute all the necessary instruments and documents to effect transfer of parcel of land known as L.R. No. 209/11091 from the Defendant to the Plaintiff's name.

2. The defendant swore an affidavit in response to the Originating Summons on 16th August, 2001 which was filed in court on 17th August, 2001. He averred that he became the registered owner of the suit property on 16th January, 1990 and therefore it was his contention that the Plaintiff's claim for adverse possession was premature as the period of 12 years had not elapsed since the property was registered in the Defendant's name. He stated that he had made all the statutory payments since he became the registered proprietor of the land and had contacted the Plaintiff in May 2000 and requested him to vacate from the suit land but the Plaintiff did not vacate. The Defendant stated that even though the Plaintiff had given the Defendant the impression that he would vacate he instead put up new structures on the land forcing the Defendant to enlist the help of the local authority to assist in having the Plaintiff evicted but to no avail. He urged the court to dismiss the summons and order the eviction of the Plaintiff from his parcel of land.

3. This matter was listed before me for hearing on 27th November, 2018 during service week at the Nairobi Milimani Environment and Land Court. The Plaintiff testified and called 2 witnesses. The Defendant testified as the sole witness in support of his case. The parties at the commencement of hearing agreed to rely on the documents and witness statements they had filed. For the Plaintiff, the witness statements of Mary Weveti Mbagathi and Julius Njihia Njoroge were admitted as part of the evidence whereas the statement made by Geoffrey Onchangwa Moriango was admitted in support of the Defendant's case.

4. The Plaintiff, Ravji Karsan Sanghani (PW1) adopted his supporting affidavit sworn on 25th July, 2001 and his further affidavit sworn on 20th August 2001 as his evidence in the matter. He averred that he first received from the Defendant communication to vacate from the suit property on 28th June 2001 and that was when he learnt that the Defendant had been the registered proprietor of the land since 1st May 1986 when he was issued with a letter of allotment. It was the Plaintiff's averments that the Defendant's title was extinguished in 1998 as he (the Plaintiff) had been in continuous, exclusive and conspicuous occupation of the whole parcel of land since 1979 under circumstances that constituted adverse possession. The Plaintiff stated that he had reclaimed and had substantially developed the suit land.

5. Among the developments the Plaintiff said he had effected on the suit land was erecting a fence around the land in 1979; levelling and filling hardcore and murrum on the land in 1979; construction of toilets in 1980, constructing a joinery workshop in 1979; constructing a

concrete ramp and parking bay for motor vehicles in or about 1984; installation of a 3 phase electricity transformer in or about 1985; constructing a workshop for repairing and maintaining tractors and lorries in or about 1987; constructing staff quarters for 10 families in or about 1988; constructing an office and store building in or about 1990; planting several trees on the land and parking machines, trucks and motor vehicles on the land. He stated that in carrying out these developments he was clearly treating the land as his own and the activities were hostile to the Defendant's interests and therefore adverse.

6. Salim Omari Maluso (PW2) adopted his written statement and testified that in 1984 he made inquiries and found out that the suit land belonged to the Plaintiff. He stated he requested the Plaintiff to allow him to set up a kiosk on the suit land which the Plaintiff did and he proceeded to put up a kiosk and constructed 2 houses on the land with the Plaintiff's permission. He testified that when he moved onto the land the Plaintiff had a workshop and there were temporary structures for workers. He told the court that he had been in occupation of the land since 1984 and throughout his stay on the land no one had ever interrupted his or the Plaintiff's occupation of the land.

7. Maurice Nyajwaja Ndhiga (PW3) testified that in 1987 he requested the Plaintiff to let him put up a welding and mechanic workshop on the suit land. PW3 testified that he constructed houses for himself and about 20 of his workers and had also put up rentals on the premises with the Plaintiff's approval. He testified that by the time he settled on the land, the Plaintiff had set up his own workshop and for the time he had been on the land, no one had interrupted their occupation of the land.

8. On his part, the Defendant, Peter Gakunu (DW1), testified that he had applied to the Government for allocation of an unsurveyed Plot in 1986 and he was duly allocated a Plot vide a letter of allotment dated 23rd April 1986. After paying all the dues stipulated in the letter of allotment, he followed up on the processing of the title which was issued to him on 16th January 1990. He stated that it was only after he got the title, that he became aware of the dimensions of the property. He stated he took possession of the plot and left a caretaker in charge as he was working outside the Country at the time. He testified that he used to visit the site regularly and had taken architects to the site to enable them come up with architectural designs as he intended to develop the property. He testified that the Plaintiff was evicted from the land in 2001 during the pendency of the suit but had returned soon after.

9. The parties filed their written submissions following the closure of the trial. Upon review of the pleadings, the evidence and the submissions filed by the parties, I summarize the issues for determination as follows:

- a) **Whether the Plaintiff's possession and occupation of the suit property constituted adverse possession?**
- b) **If the possession was adverse from when did the statutory period of 12 years begin to run?**
- c) **Whether the Plaintiff has been in continuous occupation and possession of the suit property without interruption for a period of 12 years.**
- d) **Whether or not the defendant has been dispossessed or has discontinued his possession during the statutory period; and**
- e) **Whether the plaintiff is entitled to the reliefs sought.**

10. The Plaintiff's claim against the Defendant was brought under **Order XXXVI Rule 3D** of the Civil Procedure Rules which was replicated in **Order 37 Rule 7** of the Civil Procedure Rules, 2010. The Rule prescribes the manner in which a suit for adverse possession under **Section 38** of the Limitation of Actions Act Cap 22 Laws of Kenya is to be commenced as follows:-

Order XXXVI Rule 3D

- i. **An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.**
- ii. **The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been attached.**
- iii. **The court shall direct on whom and in what matter the summons shall be served.**

11. Section 38 of the Limitation of Actions Act provides that where one claims entitlement to land by adverse possession they may apply to be the registered proprietor in place of the person then registered as proprietor of the land. The principles applicable in a claim for adverse possession in relation to registered land were considered and set out in case of **Wambugu -vs- Njuguna [1983] KLR 172**, where the Court of Appeal held that;

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

12. In the case of **George Ogake Pius -vs- Esther Nyasani Makori & 2 Others [2018] eKLR**, this Court had occasion to deal with the issue of what constitutes adverse possession and at paragraph 9 of the ruling rendered in the matter, I expressed myself thus;

“There is no express definition of adverse possession in the Limitation of Actions Act. However, Section 13(1) of the Act provides that a right of action in recovery of 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 in the Act is referred to as adverse possession). It is evident

thereof, that the doctrine of adverse possession is invariably tied to Section 7 of the Act ... which bars an owner of a parcel of land from an action to recover it after the expiry of twelve years. In Black's Law Dictionary, 10th Edition adverse possession is defined as:-

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious.”

For a claimant to succeed in a claim of adverse possession to land such claimant has to satisfy the following:-

- 1. The parcel of land must be registered in the name of a person other than the claimant.**
- 2. The claimant must be in open and exclusive possession of that parcel of land in an adverse manner to the title of the real owner.**
- 3. The claimant must have been in that occupation/possession for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”**

13. It is not disputed that the Defendant is the registered owner of land parcel **L.R. No. 209/11091**. It is also not disputed that on 23rd April 1986, the Defendant was issued with a Letter of Allotment for the unsurveyed Plot by the Commissioner of Lands. The Defendant paid the requisite fees as set out in the Letter of Allotment and on 16th January, 1990 was registered as the owner and was granted title to the land under the Registration of Titles Act for a period of 99 years from 1st May, 1986.

14. Under Section 37 of the Limitation of Actions Act, Cap 22 Laws of Kenya adverse possession would only apply where the land is registered. Section 37(a) provides:-

37. This Act applies to land registered under the Government Lands Act, the Land Titles Act, or the Registered land Act, in the same manner and to the same extent as it applies to land not so registered, except that -

(a) Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished. Such title is not extinguished but is held by the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act.

15. The Defendant was allocated the suit land on 23rd April 1986 following his application for allocation. At the time of allocation, the land was unsurveyed and it constituted part of Government land and that is how the Government could alienate it. It is trite law that adverse possession cannot accrue against land that is owned by the Government. The Plaintiff contended he occupied the suit land in 1979 and had since that time effected various developments thereon which demonstrated his occupation and possession was adverse to the rights and interests of the registered owner. Thus, even assuming the Plaintiff had during the period 1979 to 1986 occupied and possessed the land under circumstances that could amount to adverse possession, my view is the Plaintiff could not adversely possess the land against the Government such that the Government’s rights and interest over the land could be extinguished. The doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government. Section 41 of the Limitation of Actions Act excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

41. Exclusion of public land

This Act does not -

(a) enable a person to acquire any title to, or any easement over -

- i. Government land or land otherwise enjoyed by the Government;**
- ii. Mines or minerals as defined in the Mining Act (Cap. 306);**
- iii. Mineral oil as defined in the Mineral Oil Act (Cap. 307);**
- iv. Water vested in the Government by the Water Act (Cap. 372);**
- v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered Land Act (Cap. 300));**
or
- vi. Land vested in the Trustees of the National Parks of Kenya; or**

16. The Defendant stated that he took possession of the suit land as from January 1990 when he got registered but indicated that owing to exigencies of his duties, he spent most of his time working outside the Country up to the year 2000. He averred that he had been paying land rents and rates as and when they fell due. It was his testimony that when he was working abroad, he had left a caretaker on his land. In May 2000, he made a request to the Ministry to assist him recover possession of his Plot from the Plaintiff to enable him build on the land.

17. The Defendant stated that the Plaintiff took advantage of his absence from the Country to occupy a portion of his (Defendant's) land but maintained that he never discontinued possession and that even if the Plaintiff may have adversely occupied some portion of the Defendant's land the requisite period of 12 years had not lapsed so that the Defendant's title had become extinguished.

18. The key question is whether the Plaintiff has been in continuous and uninterrupted occupation and possession of the suit property for a period of 12 years in circumstances that amount to adverse possession. The Plaintiff claimed that the statutory term of 12 years begun running from 1st May 1986 when the Defendant was issued with the letter of allotment. For his part, the Defendant contended that he acquired title to the suit property on 16th January, 1990 after he had met all the terms and conditions in the letter of allotment. The Defendant argued that time could not run against him before he was registered as the proprietor of the land.

19. In the case of **Wreck Motors Enterprises -vs- The Commissioner of Lands & 4 Others C.A No. 71 of 1997 [1997]eKLR** the Court of Appeal held;

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.” [Emphasis added].

20. The Court's holding was anchored on Section 23(1) of the Registration of Titles Act (now repealed) which provided the effect of registration of title thus:-

23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party.

21. It is registration of title that confers rights of ownership to a proprietor of land. A letter of allotment does not confer rights of ownership but is merely a conditional offer of the land to the allottee subject to the allottee satisfying the terms and conditions of the allotment. The allotment can be revoked and/or cancelled before the title to the land is processed and issued in the name of the allottee. It is only after one has adhered to the requirements set out in the Letter of Allotment and is subsequently registered and issued with title that one acquires an absolute and indefeasible proprietary interest in the land. In my view, adverse possession can only run against the title of a registered proprietor and in the instant case the Defendant was first registered as proprietor of the suit land on 16th January 1990. Time could only run from that date.

22. In the case of **Francis Gitonga Macharia -vs- Muiruri Waithaka Civil Appeal No. 110 of 1997 [1998]eKLR** which was cited with approval in the case of **Titus Kigoro Munyi -vs- Peter Mburu Kimani Civil Appeal No. 28 of 2014 [2015] eKLR** the Court of Appeal held that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent. In the case of **Francis Gitonga Macharia** [supra] the Court stated as follows:-

“We have considered this appeal with anxiety. It is quite clear from the affidavit in support of the Originating Summons that as at the date of the suit the prescribed twelve years limitation period for bringing an action based on adverse possession of land had not run in favour of the Appellant. He deponed that he went into possession of the suit land sometime in March 1974. As at that date, the Respondent had not become a registered owner of the suit land. As we stated earlier he became registered as owner on 16th December, 1974 and by 15th April 1986, a period of twelve years had not run. Consequently, the Appellant's claim based on adverse possession was premature and therefore incompetent.”

23. The Court in the case of **Titus Kigoro Munyi -vs- Peter Mburu Kimani** [supra] further held that for a claim of adverse possession to succeed, it must be proved that the registered owner had knowledge of the occupation. The Court held as follows;

“Guided by the dicta as stated by Kneller J. hereinabove and as adopted by this Court in Francis Gicharu Kariri -vs- Peter Njoroge Mairu, - Civil Appeal No. 293 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court.”

24. The Defendant has submitted that he became aware of the Plaintiff's occupation and possession of a portion of his land in 2000/2001 when he wanted to carry out developments. However, the Defendant had stated when he was issued with a title in 1990 his land was delineated and he took possession. Though he was working out of the Country, he stated he had a caretaker and he used to regularly come on Vacation and he would visit the land. On the evidence adduced it is evident, the Plaintiff was actually in occupation and possession of a portion of the Defendant's land. This occupation and possession was open, notorious and inconsistent with the interest of the Defendant as the owner and I accept it was adverse possession of which the Defendant had knowledge of and/or ought to have had knowledge of.

25. The issue for determination is whether the adverse possession by the Plaintiff extinguished the title held by the Defendant to the suit land and/or to a portion of the land thereof. I have held that the period of adverse possession started to run against the Defendant as from the time he was registered as the owner, the 16th January 1990. The period of adverse possession needed to have run for a period of 12 years or more as from that date prior to the institution of the suit for the Defendant's title to be held to have been extinguished. The period of 12 years would in the premises have ran out on 16th January 2002. The Plaintiff instituted the present suit on 25th July 2001 before the mandatory period of 12 years had elapsed and in those circumstances the doctrine of adverse possession was prematurely invoked and the Plaintiff's suit must fail on that account.

26. The net result is that I find and hold that the Plaintiff has not proved his case on a balance of probabilities. Thus, though I answer issue numbered (a) in the affirmative, I answer issues (b), (c) and (d) in the negative. The Plaintiff is accordingly not entitled to the reliefs sought in the Originating Summons. The Plaintiff's suit is dismissed with costs to the Defendant.

27. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2019.

J. M MUTUNGI

JUDGE

In the presence of:

N/A for the Plaintiff

M/s Tororei for Kurgat for the Defendant

Musyoki Court Assistant

J. M MUTUNGI

JUDGE