



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 45 OF 2018(OS)

FREDRICK NDUGO MUIRURI.....PLAINTIFF/APPLICANT

VERSUS

MARY NJOKI MUIRURI 1STDEFENDANT/RESPONDENT

BONIFACE KARANJA MUIRURUI 2NDDEFENDANT/RESPONDENT

BENSON GITAU NGANGA 3RDDEFENDANT/RESPONDENT

ELIZABETH WANGUI FRANCIS 4THDEFENDANT/RESPONDENT

TERESIA NYAMBURA GACHERU 5THDEFENDANT/RESPONDENT

JUDGMENT

1. On the 19/12/2017 FREDRICK NDUGO MUIRURI (hereinafter called the Plaintiff) moved the Court under Order 37 Rule 1 and 7 of the Civil Procedure Rules, Sections 38 of the Limitations of Actions Act, and sought the following orders that ;

- a) The Applicant has acquired by way of Adverse Possession the portion of land measuring 2.65 acres or thereabouts from parcel No LOC17/KAMAHUHA/1259 (suit land).
- b) An order issues to the Land Registrar Muranga to rectify the register of the suit land and register the Plaintiff as the proprietor of the said portion in place of the Respondents and issue a certificate of title accordingly upon payment of the statutory fees.
- c) The costs of the suit be provided for.

2. The application is supported by the Applicants' supporting affidavit dated the 15/5/18 and filed on the 25/5/18. In it, the Plaintiff deponed that through his father George Gatete he purchased 1.5 acres from Muiruri Rugu out of parcel LOC17/KAMAHUHA /1076, which he owned jointly with Kanuthu Rugu. The Land Control Board was sought and obtained in respect to the same in 1980 as shown on the approved minutes of the Land Control Board. In 1984, he purchased another 1.13 acres from the said Muiruri Rugu and Njoki Rugu and obtained Land Control Board consent evidenced by the consent dated the 14/12/84. The vendors caused a survey of the land and mutations forms were prepared dated the 27/4/81 but were not registered. All these while he was put in possession and developed the land including burying close family members thereon. He depones that there has not been any break in his possession and occupation of the suit land.

3. The Respondents have been sued as the legal representatives of the estate of the vendors vide the grant of administration issued in Succ cause no 240/2001.

4. The 2nd Respondent vide the Replying Affidavit sworn on 10/7/18 and filed on even date denied the Plaintiff's claim and deponed that the alleged partition was not identifiable on the ground and that there is no evidence of the proposed transfer of the suit land to the Plaintiff by Muiruri Rugu and Kanuthu Rugu, the registered owners of the suit land. That the Rugus did not own parcel LOC17/KAMAHUHA /1076 and the Plaintiff's claim is untenable. The Plaintiff is not in possession of the suit land and that he has neither demonstrated any developments on the suit land. He faulted the Plaintiff for not asserting his claim during the lifetime of the Rugus. Further, he refuted the Plaintiff's claim that he is the legal representative of the states of Muiruri Rugu and stated that he is only a beneficiary. Finally he deponed that the 1st Defendant died on 29/5/04 and enclosed a death certificate dated the 25/5/2005.

5. The 4th and 5th Defendants through their Replying Affidavit sworn on 4/9/18 and filed on the 7/9/18 deponed that the suit land is registered in the names of Muiruri Rugu and Kanuthu Rugu (their mother), deceased. That they are entitled to the share of their mother and the Plaintiff should claim the land from the estate of Muiruri Rugu alone. That vide Succession cause No 240 of 2001 they were appointed

legal representatives of the said Muiruri Rugu and Kanuthu Rugu. The certificate of confirmation of grant was issued on 15/10/2003 in respect to the estate of Kanuthu Rugu alias Hannah Wanjiru Rugu and Muiruri Rugu in which the suit land (1259) was distributed as follows;

Benson Gitau Nganga - 0.5 acres

Elizabeth Wangui Francis &

Teresia Nyambura Gacheru - 4.0 acres jointly.

Mary Njoki Muiruri &

Boniface Karanja Muiruri - 4.50 acres jointly to hold in trust for their family.

6. That there is an ongoing Succ Cause No 1207 of 2004 in Nairobi. Further, they averred that the possession of the Plaintiff if any was interrupted by the succession causes in Court.

7. In the statement of defense filed by the 4 & 5th Defendants, they aver that if the Plaintiff is in possession of the suit land, then it was with the permission of the owner who was in the process of effecting the transfer before he died as seen by the consent to subdivide dated the 14/12/84. Further that the area 2.63 acres claimed by the Plaintiff is not on their portion of 4 acres in the whole parcel LOC17/KAMAHUHA /1259, which measures 8.47 acres. That the 1st Defendant is deceased.

8. The 1st and 3rd Defendants did not file any defence against the Plaintiff's claim.

9. On the 25/9/18 the parties took directions before the Court and with the concurrence of the Court converted the pleadings be deeming the Originating Summons as a plaint and the Replying Affidavit as defence.

10. At the hearing of the suit, the Plaintiff testified and informed the Court that he is a businessman. He relied entirely on his Supporting Affidavit dated the 15/5/18 in his evidence in chief as well as the list of documents dated 15/5/18 in support of his case. He stated that he has put a worker to live on the suit land for the last 30 years. Though he has not built a permanent house, he carries out farming of maize, bananas and trees. That he has also buried his family members thereon.

11. During cross-examination, he stated that parcel No 1 LOC17/KAMAHUHA /076 was owned by Muiruri Rugu and Kanuthu Rugu. That a portion of then LOC17/KAMAHUHA /1076 was sold to his father, on his behalf. He admitted that he did not produce the 1st agreement in respect to 1.5 acres in Court. He confirmed the Land Control Board dated the 14/12/84 was for self-division of the land (1076) by Muiruri Rugu into two portions of 1.13 and 8.87 acres. He stated that the Land Control Board consent does not disclose his father name or his as the buyer of 1.13 acres. In addition, the mutation forms dated the 27/4/81 does not disclose the owner of the 2nd parcel. He averred that he entered the suit land in 1980

12. Further he stated that Kanuthu Rugu was not involved in the transaction. That the 4th and 5th Defendants are the daughters of Kanuthu Rugu. That they have been sued because they are the legal administrators of the estate of Muiruri Rugu. That the land was registered in the names of Muiruri Rugu and Kanuthu Rugu. Kanuthu Rugu was the stepmother of Muiruri Rugu.

13. Asked to identify his land on the ground he simply stated that his land is situate on parcel LOC17/KAMAHUHA/ 1259 and is identifiable on the ground.

14. The 2nd Defendant testified and informed the Court that his father Muiruri Rugu and his step grandmother owned LOC17/KAMAHUHA /1259. That he and his brothers occupy the suit land. He confirmed that his father sold one acre of land to the Plaintiff to save the suit land from being auctioned to recover a loan he had borrowed from the bank. He was categorical that the Plaintiff can have his one-acre and no more. He confirmed that the Plaintiff has planted trees mangoes and maize on the one acre of land that the Plaintiff utilizes. Further, he clarified that the land purchased by the Plaintiff was the share of his father and not Kanuthu's.

15. The 5th Defendant testified that she was aware that Muiruri Rugu sold land to the Plaintiff. That her mother Kanuthu Rugu did not sell any of her share in the parcel LOC17/KAMAHUHA /1259. She stated that the children of Muiruri Rugu live on the suit land. She stated that the Plaintiff farms on approx. 2 acres where he cultivates crops on the land. That he has not built any house on the said land. She stated that the original land was approx. 18 acres but now it is remaining about 9 acres. That the land has not been subdivided on the ground. There is a succession cause to revoke the grant, which is pending in Nairobi. That the children of Muiruri and Kanuthu are beneficiaries of the suit land as shown in the certificate of confirmation of grant dated the 15/10/03.

16. The 4th Defendant stated in evidence that the Plaintiff is the son of Gatete. That her mother did not sell her portion of the suit land and therefore the Plaintiff should claim from the estate of Muiruri and not drag her mother's share/estate into it. She explained that the succ cause No 240/2001 was in respect to the estate of her mother but the children of Muiruri Rugu were provided for but the 1st Defendant being aggrieved filed a case in Nairobi seeking to revoke the grant, this case is yet to be determined.

17. The Plaintiff in his written submissions dated the 30/3/19 inter-alia submitted and sought to withdraw the suit against the 1st and 3rd Defendants on the grounds that they were deceased even before the suit was filed.

18. The 2nd Defendant submitted that the area the Plaintiff is claiming Adverse Possession is not defined as no mutation form has been filed

by the Plaintiff to show which of the beneficiaries will be affected and to what extent. He also termed the suit incompetent because one of the Defendants and beneficiaries of the estate is deceased and determining the suit in her estates' representation will amount to being condemned unheard.

19. The 4th & 5th Defendants submitted and reiterated their evidence as set out in the hearing. They opined that the portion that the Plaintiff purchased should be exercised from the portion belonging to Muiruri Rugu and not their portion. That having not been privy to the agreement to sale, the Plaintiffs claim should be struck out against them.

20. The issue for determination is whether the Plaintiff has established a title by way of Adverse Possession.

21. The original land LOC17/KAMAHUHA /1076, which later became LOC17/KAMAHUHA /1259, was registered in the names of Muiruri Rugu and Kanuthu Rugu, deceased. Kanuthu Rugu was the stepmother of Mururi Rugu. Upon the death of Kanuthu Rugu the 4th and 5th Defendants were appointed as administrators of the estate of Kanuthu Rugu. Vide a certificate of confirmation of grant issued on the 15/10/2003, the children of Muiruri Rugu were provided for and the land distributed as set out in para 5 of this judgement.

22. The 1st Defendant is the wife of Muiruri Rugu. According to the death certificate on record, she died on the 25/5/05. The 2nd and 3rd Defendants are the children of Muiruri Rugu and Mary Njoki Muiruri whilst the 4th and 5th are the daughters of Kanuthu Rugu.

23. The Defendants are all beneficiaries of the suit land pursuant to the certificate of confirmation of grant issued on the 15/10/03.

24. 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”.

25. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this case the Plaintiff has led evidence that he took possession of the suit land measuring 2.63 in 1980s after purchasing it from Muiruri Rugu and on payment of full purchase price and as he awaited the formalization of the process of subdivision and eventual transfer. The vendor died before this was concluded.

26. He stated in evidence that though he has not built a house, he has kept a worker on the suit land for the last 30 years. His evidence that he cultivates maize, bananas mango trees was supported by the DW3 who stated that the Plaintiff farms on about 2 acres of land. The 2nd Defendant however was categorical that the Plaintiff bought one acre of land from his father and he should have it. He stated that he utilizes the said portion for farming and has even interred some his relatives thereon. The 4th Defendant corroborated the evidence of the Plaintiff when she stated that the Plaintiff is in possession of suit land. The only contention that the 4th and 5th Defendants who are the beneficiaries and daughters of Kanuthu Rugu is that it should come from the portion of Muiruri Rugu have and not their entitlement.

27. The import of the above evidence is that the Plaintiff has continued to utilize the land as of right and in direct conflict with the right of the owners then and even now. He has established *animus possidendi*.

28. Madan J in the case of **Public Trustee Vs Wanduru (1984) KLR 314** stated as follows;

“Adverse Possession should be calculated from the date of the payment of the purchase price to the full span of the twelve years if the purchaser takes possession of the property because from this date the true owner is disposed of possession.”

29. It is the finding of the Court that the Plaintiff has proved possession of the suit land since the 1984. The registered owners therefore were dispossessed of the suit land and according to the evidence by the Plaintiff no one has dispossessed him nor has, he handed over possession. It is his evidence that his 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.”

30. The evidence of the Defendants manifestly show that they have been aware of the possession of the suit land by the Plaintiff. They all know the Plaintiff and are aware that he occupies the suit land. This fact is not disputed. By implication, the previous owners had knowledge of the same. In particular Kanuthu Rugu died in 1996 while Muiruri died in 1999 as per the evidence of the 2nd Defendant. There is no evidence that the said Kanuthu Rugu took any steps to dispossess and or remove the Plaintiff from the suit land. By the time the previous owners died, the Plaintiff would have been on the suit land for over 12 years. His continued occupation remains unbroken and unchallenged by any of the Defendants and thus time never stopped running. The 4th and 5th Defendants have contended that the succession causes interrupted the period of Adverse Possession. I do not agree with this proposition. I say so because a succession cause merely determines the successors of a deceased person and establishes the beneficiaries of the estate. It does not seek to assert title to the suit land. It is my view that time did not stop running on account of the succession cause.

31. I have examined the unregistered mutation form dated the 27/4/81, which indicates the portion of 0.6 Ha (1.5 acres) under George Gatete the father of the Plaintiff. This evidence is consistent with the Plaintiff's case that he purchased 1.5 acres in 1980 through his father George Gatete.

32. When did time start running for purposes of Adverse Possession. The Plaintiff has led evidence that he purchased the first portion of 1.5 acres in 1980 and 12 years would be 1992. The second portion was acquired in 1984 and immediately took possession. The statutory period therefore ended in 1996. From whichever angle it is looked at the Plaintiff has established a right to Adverse Possession and the Defendants being the registered owners of the suit land are holding the same in trust for the Plaintiff.

33. The issue of whether or not the suit land is identifiable on the ground was raised by the 4 & 5th Defendants. This matter in view of the findings above is frivolous. I say frivolous because the Defendants have acknowledged that the Plaintiff is in occupation. Adverse attaches on the land and it cannot be that it is hovering in the air so much so that it would not be possible to pinpoint where the possession of the Plaintiff is.

34. Notwithstanding the holding of the Court in the preceding paras, a more serious and fundamental problem is that the Plaintiff has sued the 1st and 3rd Defendants who are said to be deceased. The Defendants are listed as owners of the suit land in various proportions. The Plaintiff purported to withdraw the suit against the 1st and 2nd Defendants in his submissions. There is no pleading withdrawing the suit. It is trite that submissions are the summaries of a party's suit and cannot take the place of pleadings. As at the time of writing the judgment therefore, the 1st and 3rd Defendants are parties to this suit. They were sued way after they met their demise. It is not possible for the Court to strike out the suit against the said Defendants because whichever way it is looked at, they are joint owners of the suit land. Determining the case in the state that it is would amount to condemning their estates without being heard.

35. In the end, I dismiss the suit in its entirety.

36. Costs are payable by the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 27TH DAY OF JUNE 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Present in person

3rd Defendant: Absent

Ms Kilonzo for the 4th and 5th Defendants

Kuiyaki and Njeri, Court Assistants