



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANGA

ELC NO. 149 OF 2017(OS)

JOSEPH NDUNGU KARANJA.....PLAINTIFF/APPLICANT

VS

MARY WANGARI GITHUA (sued as the legal Representative of

ELIJAH GITHUA NGANGA Deceased).....DEFENDANT/RESPONDENT

JUDGMENT

1. On the 15/12/16 the applicant (hereinafter called the Plaintiff) moved the Court under Order 37 rule 7 of the Civil Procedure Rules, section 28 of the Registered Land Act (cap 300) repealed and Section 38 of the Limitations of Actions Act, and sought the determination of the following questions;

- a) The Respondents as administrator of the Estate of Elijah Githua Nganga's rights Title to 0.58 Ha of all that piece of land known as LOC.17/SABASABA/741 situate in Murang'a County be deemed and declared to have been extinguished thorough Adverse Possession of the applicant.
- b) The Applicant be declared and registered as the proprietor of the 0.58Ha of land known as LOC.17/SABASABA/741.
- c) In the alternative the Respondent being the registered proprietor or administrators of the estate of the late Elijah Githua Nganga the registered proprietor of all that parcel of land known as LOC.17/SABASABA/741 measuring 0.58 Ha in the approximate be compelled to transfer the said suit land to the Applicant.
- d) That an order do issue to the Land Registrar Murang'a to effect that change of ownership from GITHUA NGANGA to JOSEPH NDUNGU KARANJA.
- e) That the costs of this application be in the suit.

2. The application is supported by the Applicants supporting affidavit filed on the 15/12/16.

3. The Defendant denied the Plaintiff's claim vide the Replying affidavit dated the 27/4/18. She admitted that she succeeded the suit land upon the demise of her husband vide Succession cause No 151 of 1986. That her husband died on the 6/3/1986. The Plaintiff filed suit No HCCC No 2697 of 1981 abated and an attempt to revive the same was dismissed. It is her contention that Adverse Possession is untenable as it was interrupted by the said suit in 1981. That computation of time for purposes of adverse stopped on the death of the registered owner. That the applicant has not been in possession of the suit land as his structures were demolished in 1981.

4. Though the Defendant was represented by Counsel she filed an application to cease acting. The Defendant having been served with the hearing notice, did not attend Court and the matter proceeded exparte.

5. At the hearing the Plaintiff informed the Court that he entered the suit land in 1962 and has been in continuous occupation todate. That the suit land was registered in the name of the defendants' husband and upon his death it devolved to the Defendant as per the confirmation of grant of administration issued on the 16/2/1989. He also produced a certified copy of the search dated 22/9/16 in support of his application. On the suit land, he stated that he has made developments such ass construction of his family home, planted trees, avocadoes, coffee and mangoes. That he has not been removed by the Defendant nor the deceased since 1962 neither has he vacated the suit land.

6. He informed the Court that he sued the deceased Elijah Githua in 1981 HCCC No 2697 but the suit abated after one year. His attempts to revive the suit failed when the suit was dismissed.

7. James Nganga Kibaya testified and informed the Court that he has known the Plaintiff since 1950s. Further he testified that the Plaintiff lives on the suit land and reiterated the developments that he has made. He informed the Court that sometime in 1970s the said Githua demolished the Plaintiffs house but the Plaintiff did not vacate the suit land. That the Defendant has never occupied the suit land.

8. The Plaintiff filed brief submissions which I have read and considered.

9. The key issue is whether the Plaintiff has established title by way of Adverse Possession.

10. Though the plaintiffs claim is not contested he bears the full responsibility to proof his claim.

11. To proof a claim for Adverse Possession the Plaintiff must prove the existence of the following ingredients; open and notorious, continuous, exclusive, and actual possession of the suit land for the span of the statutory period of 12 years. 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”.

12. 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 and his witness that the Plaintiff has been in continuous uninterrupted occupation of the land since 1962. It is on record that there was an attempt to regain entry by the said Elijah Githua but it was repulsed. Since then the Plaintiff has been in exclusive control of the suit land. The witness led evidence that the Defendant does not occupy the suit land.

13. The Plaintiff led evidence that he was showed the land by his uncle the late Murogo. He claimed that the suit land belonged to his late parents who died during the state of emergency in Kenya, that is to say around 1952. He built his house and settled on the land in 1962. When he asked the late Elijah to give him the documents for the land he refused. Later he realized that the suit land had been registered in the name of Elijah Githua in 1974. He then filed suit HCC No 2697/1981 against Githua to assert title in the suit land. This evidence is vital as it shows that the plaintiffs entered the land without the consent of the late Githua. He stated in evidence that he does not lease the suit land but lives on it as of right.

14. When did time start running for purposes of adverse possession? Section 13(1) of Limitation of Actions Act states that;

“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.”

15. In the circumstances of this case the Plaintiff entered the land in 1962 and 12 years later in 1974 the right to Adverse Possession had accrued and vested in the land. Even if it is argued that the suit in 1981 interrupted Adverse Possession, then time could have started running from 1986 when the suit abated. By 1998 the right to adverse possession would have vested and accrued to the plaintiff. The third scenario is that time can be calculated from 1989 when the suit land devolved to the Defendant and by 2001, time would have run in favour of the plaintiff. From whichever angle it may be looked at the Plaintiff has proven that adversity has run the full course in his favour. There is no evidence that the Defendant reentered the land not filed any suit to assert her legal rights in the land.

16. Evidence was led that the Plaintiff has occupied the land openly and exclusively carrying out farming activities thus establishing animus possidendi that is to say utilizing the land as of right and adverse to the right of the Defendant as a registered owner.

17. In the end I make orders granting the Plaintiffs Originating Summons as prayed. I make no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF JUNE, 2019.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Mshila HB for Gatuma for the Plaintiff. Plaintiff is present.

Defendant: Absent

Kuiyaki and Njeri, Court Assistants