



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 14 OF 2017(OS)

NELIUS WAIRIMU KIUNJURI.....PLAINTIFF/APPLICANT

VS

GEORGE MWANGI KARANJA.....1ST DEFENDANT/RESPONDENT

PETER NDEGWA KAMONDE.....2ND DEFENDANT/RESPONDENT

JUDGMENT

1. On the 3/9/13 Nelius Wairimu Kiunjuri (hereinafter called the Plaintiff) moved the Court under Order 37 rule 7 of the Civil Procedure Rules, Sections 17 and 38 of the Limitations of Actions Act and sought the following orders;

- a) A declaration that the Plaintiff has been for a period in excess of 12 years in Adverse Possession of Land Reference Number LOC10/KAHUTI/2664 and LOC 10/KAHUTI/2665 (hereinafter called the suit lands).
- b) The titles of Mwhaki Kamonde and her successors George Mwangi Karanja and Peter Ndegwa Kamonde have been extinguished by virtue of Section 17 of the Limitations of Actions Act.
- c) The suit lands be and are hereby transferred to the Plaintiff
- d) The Defendants to transfer the said parcels of land to the Plaintiff and in default all the necessary documents to effect such transfer be executed by the Deputy Registrar of this honourable Court.
- e) Costs of the suit be paid by the Defendants.

2. The application is supported by the Applicant's supporting affidavit dated the 2/9/13 and filed on the 3/9/13. Briefly the Plaintiff averred that on the 19/3/67 she bought 0.5 acres of parcel No LOC 10/KAHUTI/1789 from Mrs Kamonde and her husband Kamonde Mugeka, both now deceased. She took possession of the land and constructed a house and commenced cultivation. On the 15/6/1971 vide a further agreement between the couple she purchased the balance of the suit land measuring 0.4 acres and took possession of the whole land to the exclusion of the vendors. She asserted that on 8/10/1987 the vendor secretly subdivided the original suit land LOC10/KAHUTI/1789 into two plots; LOC10/KAHUTI/2664 and LOC10/KAHUTI/2665 (the suit lands) and caused them to be registered in the names of the Defendants. That she made the discovery in 1989 and immediately caused a caution to be registered on the suit lands. In addition, she filed a suit against the Defendants in Nairobi HCCC No 3935 of 1989 where she sought orders of Adverse Possession. The Court heard the matter and determined in her favour. However, the verdict was overturned on appeal on grounds that she had filed the case through a plaint instead of originating summons. She avows that she has been in continuous uninterrupted and exclusive possession of the suit lands from 1967 to date.

3. The Defendants denied the Plaintiff's claim vide a replying affidavit dated the 9/10/13 and filed on even date and sworn by the 1st Defendant where he deposed that the suit lands yielded from a subdivision of land parcel 1789 owned by their mother. They cast doubt on the allegations of purchase by the Plaintiff stating that their father could not have sold land that he never owned. That the Plaintiff has not been in continuous and uninterrupted occupation of the suit lands as the same was interrupted by the Court case filed in 1989.

4. The Defendants too filed a suit against the Plaintiff's in CMCC No 275 of 2013 at Murang'a where they sought orders for eviction of the Plaintiff or persons claiming interest on the suit lands under her and removal of caution lodged on the 6/4/1988. The Defendant (herein the Plaintiff) resisted the claim of the Defendants on the grounds that she is entitled to ownership by way of Adverse Possession.

5. Keeping in line with the overriding objectives of the Court read with the provisions of Art 159 which mandates this Court to deliver substantive justice, and on application by the parties, the Court consolidated the two suits on the 23/7/18 with the lead file being this one and the Defendants claim in CMCC No 275 of 2013 being the defendant's counterclaim.

6. At the hearing of the suit the Plaintiff testified and adopted her witness statement dated the 2/9/13 and the affidavit in support of the Originating Summons of even date. She produced documents annexed to her list of documents dated the 21/7/17 marked as PEX No 1-5. In brief she reiterated the contents of her supporting affidavit and stated that she purchased the suit lands at the total price of Kshs 3250/- which she paid in full to Mwhaki Kamonde and took possession. The first portion was 0.5 acres which she bought in 1967 at Kshs 250/- and later in 1971 bought the 0.4 acres at Kshs 3000/- and took possession of the whole land. She informed the Court that she has lived on the suit lands since 1967 to date. She has planted nappier grass, macadamia, trees and constructed a stone house and other structures such as a cowshed. The Court heard that the original land was subdivided while she was in occupation. On cross examination she told the Court that though she did not carry out any searches on the land at the time of purchase, she was put in occupation in the land that was vacant by the vendors. She stated that the land was registered in the name of Mwhaki Kamonde but it is her husband Kamonde who signed the agreement for sale. That Mwhaki too agreed to sell the land and that is why she did not raise any objection to her occupation for many years. Even her son, the 2nd Defendant was a signatory to the agreement of sale. She stated that she bought the whole land and was put in possession of the same.

7. PW2 – Bedan Kihara Kiunjuri gave evidence in support of the Plaintiff's case and stated that he is the brother of the Plaintiff. He informed the Court that the Plaintiff has been in occupation of the suit land since 1967. He informed the Court that the Plaintiff bought 0.5 acres in 1967 and added the balance of 0.4 acres in 1971.

8. DW1- Peter Ndegwa Kamonde gave evidence and relied on his witness statement filed on 9/10/13. In it he stated that his mother subdivided the original land into two parcels in 1987 and obtained the requisite consents. That the Plaintiff removed the barbed wire and the beacons affixed by the surveyor. That the Plaintiff filed a caution in 1989 on the suit lands and proceeded to file a suit in the High Court Nairobi. On cross examination he stated that the Plaintiff lives on the portion of LOC.10/KAHUTI/2664 and cultivates nappier grass on parcel LOC.10/KAHUTI/2665. There is no fence between the two parcels hence she is in control of both parcels. He indicated that at the time of selling the land in 1967, the land was registered in the name of his mother. He informed the Court that he is unsure if his parents were parties to the agreement of sale as he is unable to authenticate the thumbprint of his father nor recall if he was present as he was in class 6 then. He admitted that the Plaintiff was not notified of the subdivision of the land as she was not the registered owner.

9. Both parties filed written submission which I have read and considered in preparing this judgement. I shall refer to them as I proceed along.

10. 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 lands.

11. 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 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.

12. 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.

13. 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.

14. 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”.

15. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this 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, first of 0.5 acres in 1967 and 0.4 acres in 1971. 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.”

16. 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 price. It is the evidence of the Plaintiff that she purchased the two plots and paid Mwhihaki Kamonde the full purchase price in 1967 and 1971 respectively.

17. When did time start running for purposes of calculating Adverse Possession? 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).

18. There is no discernible action on the part of the Defendant’s parents or the Defendants to stop time from running. From the evidence adduced by the Plaintiff, she purchased 0.5 acres of land in 1967 as shown in the agreement of sale which was not controverted. She was put in possession of that portion in 1967. By 1971 the right to title to the land by way Adverse Possession would have accrued and vested in the Plaintiff. Later in 1971 she purchased 0.4 acres of land and was put in possession. By 1983 adverse had accrued and vested in the Plaintiff. By the time the land is being subdivided in 1987 by the vendors, Mr and Mrs Kimonde, title had vested in the Plaintiff in 1971 and 1983 respectively. The subdivision and registration of the suit lands in the names of the Defendants did not confer any title to the Defendants. Mwhihaki Kimonde transferred title that was already encumbered with Adverse Possession. The Defendants therefore received and held titles in trust for the Plaintiff.

19. The Defendants have contended that Adverse Possession did not arise because of the suit filed in 1989 in HCCC No 3935 of 1989. In that case the Plaintiff sued the Defendants for Adverse Possession of the suit land. The High Court found in her favour but the decision was overturned on appeal on grounds that the suit was filed by way of plaint instead of Originating Summons. Going by the decision in **Joseph Gahumi Kiritu (supra)**, there is no evidence that the Defendants made an effective entry into the suit lands. In any event by the time the suit was filed in 1989 title had accrued to the Plaintiff by way of Adverse Possession. There is no evidence led by the Defendants that the Plaintiff relinquished her possession nor acknowledged the title of the Defendants. I have perused the titles of the suit lands and both are cautioned as at 6/4/88 by the Plaintiffs todate. The 2nd Defendant attempted to inform the Court that the Plaintiff entered the suit lands in 2004 but in his witness statement filed on the 9/10/13 he averred that the Plaintiff dug a grave in 1988 with the intention of burying her son Kirigi. In the judgement of the HCCC No 3945 the Defendants admitted that by 1967 they were not residing on the suit lands as they were residing in their father’s other lands. They admitted that the Plaintiff lived on the land as at that time in a hut built by their father. The 2nd Defendant led evidence that the Plaintiff lives and cultivates the suit lands.

20. Even if time was taken to have been interrupted by the HCC No 3945 and CA No 124 of 2000, it is to be noted that the case was determined in 2001. Time therefore started running from 2001 and by 2013 the 12 statutory years have been met. In either way the Plaintiff has proved adversity in her occupation of the suit lands.

21. 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 a stone/permanent houses and practicing subsistence farming on the suit lands (nappier grass, macadamia, trees) as though it was hers as of right. That she has done this since 1967 and 1971 todate openly and without interruption by anyone, least of all, the Defendants is not under challenge.

22. 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 evidence was led by the Plaintiff that the Defendants’ father signed the agreement of sale. Mwhihaki

Kamonde the registered owner of the land was also aware. The 2nd Defendant indeed signed the first agreement of sale. If they had no knowledge, what action did they take? There is no evidence that the Defendants nor their parents took any action to remove the Plaintiff from the suit land. It is the view of the Court that they did not take any action because they had knowledge of the occupation and possession of the land by the Plaintiff pursuant to the sale in 1967 and 1971. The 2nd Defendant asserted that he has known the Plaintiff for a long time.

23. 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.

24. I shall now turn to the Defendants’ claim in CMCC No 275 of 2013. In view of my findings in the preceding paragraphs, the claim for eviction is untenable. The Plaintiff has established title by way of Adverse Possession and therefore the claim of eviction fails. It is dismissed.

25. In the upshot I make the following orders;

- a. The Defendants claim in CMCC No 275/2013 is dismissed.
- b. A declaration that the Plaintiff has been for a period in excess of 12 years in Adverse Possession of Land Reference Number LOC10/KAHUTI/2664 and LOC 10/KAHUTI/2665 (hereinafter called the suit lands).
- c. The title of Mwhaki Kamonde and her successors George Mwangi Karanja and Peter Ndegwa Kamonde have been extinguished by virtue of S 17 of the Limitations of Actions Act.
- d. The suit lands be and are hereby transferred to the Plaintiff. The Defendants to transfer the said parcels of land to the Plaintiff and in default all the necessary documents to effect such transfer/documents be executed by the Deputy Registrar of this honourable Court.
- e. Costs of the suit shall be paid by the Defendants.

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 Ndungu Kimani for the Plaintiff

Plaintiff is present

1st Defendant: Absent

2nd Defendant: Present in person

Kuiyaki and Njeri, Court Assistants