



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 37 OF 2018 (OS)

DAVID MAINA MWANGI.....1ST PLAINTIFF

JOHN KARANJA.....2ND PLAINTIFF

NANCY NJERI NDUNGU..... 3RD DEFENDANT

VS

JOHN KAMAU KAMARA.....1ST DEFENDANT

ELIUD NJUGUNA KAMARA

(Sued as administrators of

PERIS WANJIKU KAMARA..... 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated 9/5/2011 brought under Order 37 rule 7 of the Civil Procedure Rules and section 38 of the Limitations of Actions Act, CAP 22 and later amended on with leave of the Court on 3/5/18 the Plaintiffs sought the Court's determination of the following issues;

- a. Whether the Plaintiffs are entitled by way of Adverse Possession to parcel Number LOC 3/KARIUA/145 in the shares of 1 $\frac{3}{4}$ acres (1.75 acres) approximately each and the whole of Land LOC3/KARIUAT.69 (the suit lands).
- b. Whether the Defendants right to own the suit lands has been extinguished in favour of the Plaintiffs and the Defendants do transfer the said lands to the Plaintiffs.
- c. Costs of the suit.

2. The Defendants have been sued as the legal administrators of the estate of Peris Wanjiku Kamara, the registered owner of the suit lands. See the letters of grant ad litem dated the 30/4/2018.

3. The 1st Plaintiff vide a supporting affidavit sworn on 9/5/11 stated that the suit lands belonged to their grandfather namely Warunga Kamundu. That the Plaintiffs are the children of Beth Nyambena the daughter of Warunga Kamundu. She died in 1974 leaving the Plaintiffs on the suit lands who have continued to occupy the lands to-date. That the Defendants' mother, Peris Wanjiku Kamara obtained title by way of transmission in Succ. Cause No 305 of 1983, which grant was issued in 1986. That they have developed the suit lands by planting 800 coffee trees, mangoes, avocados, macadamia and other crops. That they have built houses on parcel LOC3/KARIUAT.69/145 and cultivate LOC3/KARIUAT.69 /T.69. It is their evidence that they have utilized the land exclusively. They have attached copies of green card for parcel LOC3/KARIUAT.69 /145 and certificate of official search for LOC3/KARIUAT.69 /T.69 showing the land is registered in the name of Peris Wanjiku Kamara.

4. The application is opposed vide the replying affidavit deponed by John Kamau Kamara under a power of attorney wherein he stated that the suit lands were succeeded by their mother upon the demise of Warunga Kamundu through a confirmed grant issued on 8/11/1990. He went on to show that various cases to wit; **CMCC No 424 of 1990; succession cause No 1723 of 2009 and CA No 207 of 2016** had been filed between the father of the Plaintiffs against his mother, which cases were all dismissed. It is his case that adverse possession was interrupted by the cases that were filed in Court in respect to the suit lands.

5. In a further supplementary affidavit filed by the 1st Plaintiff in response to the 1st Defendant's replying affidavit dated the 31/3/17 he

deponed that their grandfather had 3 daughters and no son. One of the daughters was their late mother Beth Nyambena. That the Defendants' mother, Peris Wanjiku Kamara was the wife of Kamara Ndogo. That the said Peris Kamara succeeded their grandfather's land without involving them, in the succession cause. Their attempts to have the succession revoked failed. He deponed that their mother had settled on her father's land with her children and upon her demise in 1974, they continued living thereon uninterrupted to date.

6. In respect to the eviction orders issued on the 17/5/2005 in CMCC No 424 of 1990 at Thika (Mwangi Karugo – the Plaintiff's father Vs Peris Wanjiku Kamara) he deponed that the said orders were stayed by the Court on the 10/6/2005 and as a result, no eviction was executed. A copy of the orders was annexed. He further deponed that his brother Peter Ndungu Mwangi died on 15/10/08 and was buried on the suit land.

7. At the hearing of the suit the 1st Plaintiff testified and stated that he and the co- Plaintiffs each occupy 1/3 of the parcel LOC3/KARIUAT.69 /145 where they have each developed and carry out farming activities such as coffee and macadamia and subsistence farming. That he supplies coffee to Ilera Cooperative Society and produced a membership card to support his averments. That he built his house in 1990 where he lives to-date. That his mother died in 1974 and left them on the suit land. He stated that Peris Wanjiku was registered as owner in 1986 and neither she nor the Defendants have settled on the land. He informed the Court that they have planted blue gum trees on parcel No LOC3/KARIUA/T.69. In support of his evidence produced a series of documents marked PW1-8. In cross-examination, the Plaintiff stated that he constructed his house in 2000, which is contrast with his written statement where she states the house was constructed in 1990. He denied that there was any eviction in 2005. It was his evidence that his mother separated from his father and came back home and settled at her father's land (the suit lands). This evidence is consistent given that it is their father who sued Peris Kamara in 1990 where the Court ordered that Mwangi Karugo be evicted. It is in the judgement issued in succ cause 1723 at page 3 that the said Mwangi Karugo in an affidavit sworn on the 14/9/1992 in the proceedings before the subordinate in succession cause No 305 of 1983 in which he stated that he was not opposed to giving vacant possession of the suit property but required time to be allowed to remove all his properties including the trees that he had planted on the suit property. This shows that the father of the Plaintiffs occupied the suit land.

8. He stated in evidence that their clan resolved in 1974 that the land belongs to their mother Beth Nyambena and so by filing the suit he is pursuing the right that belonged to their mother.

9. PW2 – John Karanja Mwangi relied on his witness statement dated the 29/5/18 and the list of documents which to a large extent reiterated the evidence as given by PW1. In addition, he stated that he has planted 300 coffee trees 10 macadamia trees, blue gum and has 2 cows on 1/3 of parcel LOC3/KARIUA/145. That he constructed his house in 1982 but has lived on the land since 1974. He supplies coffee to Ilera cooperative society just like his siblings. That all that time the defendants have never settled on the suit lands nor taken steps to dispose them of the suit lands. That they also jointly occupy parcel LOC3/KARIUAT/T69 where they have planted blue gums for timber and firewood. He denied that they entered the land in 2016 and stated that they have lived on the land since 1974.

10. PW3 – Nancy Njeri Ndungu reiterated the evidence of the two Co-Plaintiffs. She added that she buried her husband on the suit land in 2008 and the Defendants raised no objection.

11. PW4 stated that he was the chief of the area between 1972-88 and knew the Plaintiffs as occupying the suit lands since their mother died. PW5 – Mathew Kimani Muthungu stated that he is neighbor to the Plaintiffs and is aware that they have lived on the land since 1974 when their mother died. PW5 – Emily Nyambura Wairungi a neighbor too reiterated the evidence of PW3-4 and asserted that the Plaintiffs have lived on the suit land since 1974.

12. The Defendants' evidence was tendered through two witnesses who are also the Defendants in this case. DW1 stated that he was born in Molo and now lives in Limuru. He stated that the land belongs their deceased mother whose succession was upheld by the High Court in Succ cause No 1723 of 2009. That his mother Peris Wanjiku Kamara succeeded his grandfather vide a grant that was confirmed in 1990. That the Plaintiffs entered the land in 2016 and started putting up structures and not 1974 as alleged. On cross-examination he confirmed that neither his brother mother nor himself have settled on the suit land. He, however, admitted that their brother was buried on the land in 2008.

13. DW2- Eliud Njuguna Kamara stated that he lives in Laikipia County but was born in Molo where he lived for 30 years. He testified and stated that the suit lands belong to their late mother, which she acquired through succession.

14. The parties filed written submissions, which I have read and considered.

15. The issues for determination are;

- a. Whether the Plaintiffs have proved that, they are entitled by way of Adverse Possession to the suit lands.
- b. If the answer to a is in the positive whether the Defendants right to own the suit lands has been extinguished in favour of the Plaintiffs and the Defendants do transfer the said lands to the Plaintiffs.
- c. Costs of the suit.

16. For Adverse Possession to mature into title to land the following conditions must be fulfilled:

- a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;

- c. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.
- e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.
- f. Possession must be without the permission of the owner.

17. In **Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B**, where Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”. One must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

18. It is not in dispute that the suit lands were registered in the names of Waruga Kamundu, the parties’ grandfather. The same were later succeeded by Peris Wanjiku Kamara in 1986 and titles issued in 1990. It would appear that the father of the Plaintiffs filed a suit vide Nbi Misc. 764 of 1994 seeking to revoke the grant in 1994 but the same was dismissed. The Plaintiffs further also filed a suit in CMCC 424 of 1990 at Thika seeking to assert proprietary rights over the suit land but the same was dismissed by the subordinate Court. In 2005, Peris Wanjiku sought and obtained an eviction order against the Plaintiffs’ father on 17/5/2005 but the same was short-lived as the said Court stayed it on 10/6/2005. The long and short of it is that the Plaintiffs were not evicted.

19. Evidence has been led by the Plaintiff s and supported by the witnesses that they have lived on the suit lands since 1974. The Defendants have asserted that the Plaintiffs entered the land in 2016. I have seen the photographs presented by PW1, which shows active occupation on the suit land. The Chief of the area as well as the two neighbors confirmed that the Plaintiffs have lived on the suit land since 1974. That their mother left them on the land. DW1 earlier in his evidence stated that the Plaintiffs entered the land in 1990 but during the hearing changed this evidence to 2016. The Court disbelieves the evidence of the Defendants as an afterthought in view of the affidavit evidence deponed by the PW1. In any event, the Plaintiffs did maintain their position as early as the suit for revocation filed in 2009 when they informed the Court that they were in possession. Their father filed other suits to assert proprietary rights on the grounds of possession and occupation as soon as he became aware that the suit lands had been issued to the Defendants’ mother through succession. It is also in evidence that the Defendants’ mother obtained an eviction order against the Plaintiffs’ father in 2005, which was short-lived as the same was stayed and never executed.

20. It is the Courts view that the Plaintiffs have been on the land as early as 1974. Is their possession adverse to that of the Defendants? The Plaintiffs have demonstrated in evidence that they have occupied the suit lands carrying out cash crop and subsistence farming. They have attached their membership of Ilera cooperative society where they supply produce such as coffee and macadamia. They also exhibited farming activities on the suit land in form of pictorials. The Chief and the two neighbours supported their occupation. The Defendants have not challenged their occupation save to say that they entered the land in 2016. The Court is therefore satisfied that the Plaintiffs are in exclusive control and occupation of the suit lands. The fact of farming and residency is sufficient to show *animus possidendi* and is inconsistent with the right of the registered owners. They are in possession as of right.

21. DW2 testified that his mother has had cases with the Plaintiffs who were trying to assert their rights on the land. This shows that they had knowledge that the Plaintiffs were in occupation of the suit lands and therefore their occupation was not in secret. The neighbours have described their occupation as open and with sufficient publicity.

22. The Court is satisfied in view of the evidence tendered by the parties that the possession and occupation of the Plaintiffs of the suit lands was adverse to the Defendants’ rights in the land.

23. The question that the Court must determine is when did time start running for purposes of calculating Adverse Possession. There are two possible scenarios in this case. The first one is in 1974 when the Plaintiffs’ mother died. It is undisputed that the Plaintiffs lived on the land since 1974 and 12 years later would be 1986. It would therefore mean that by the time the Defendants’ mother succeeded the title Adverse Possession had accrued to the Plaintiffs. She therefore held the title in trust for the Plaintiffs.

24. The second scenario is 1990. This is the time the title of the suit lands became registered in the name of the Defendant’s mother. DW1 in his affidavit sworn under oath on the 6/7/18 stated under para 7 as follows;

“That it is not true that the Plaintiffs have lived on the land (LOC3/KARIUAT.69 /145) since 1974 and only occupied the parcel after my mother acquired title in her name sometime in 1990.”

12 years would expire in 2002. The Defendants have argued in their submissions that the possession of the Plaintiffs was interrupted severally by the suits filed by the parties. That the Plaintiffs father filed suit against Peris Wanjiku Kamara to restrain them from evicting them vide 424 of 1990. The Defendant did not present before the Court the proceedings pleadings and the judgment in RMCC No 424 of 1990 for the Court to understand what rights the parties were adverting and defending so as to determine if there was such a cause of action that would have stopped time from running. I have seen the orders issued on 17/5/2005 in an application in RMCC No 424 of 1990. The said orders were granted in an application and were to the effect that the Plaintiff then, Mwangi Karugo be evicted. The application does not disclose any cause of action. On the 10/6/90 the said orders were stayed. Guided by section 47 of the Evidence Act, this Court is not satisfied that such application orders does not identify what could conclude a matter as envisaged by that section. Time is interrupted by a cause of

action. The Court is of the view that time was not interrupted at all contrary to the averments of the defendants in this case.

25. In the case of **Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura [1996] eKLR** the Court held that :

“Time which has begun to run 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 a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must therefore make a peaceable and effective entry, or sue for recovery of land.”

26. Similarly in the case of **Githu –vs- Ndeete [1984] KLR 776** the Court of Appeal held that:-

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner take legal proceedings or makes an effective entry into the land; (See Cheshire’s Modern Law of Real Property, 11th Edition at p. 894). Giving of notice to quit cannot be an effective assertion of right for purposes of stopping running of time under the Limitation of Actions Act.”

27. The other succession cases to wit, Succession cause No. 1723 of 2009 in which the Plaintiffs sought to revoke the grant in favour of the Defendants’ mother did not in my respectful view interrupt time from running. I say so because the succession suit was not to assert title but to determine who should be the rightful successor to the estate of Warunga Kimundu. Court of Appeal case No 207 of 2016 sought the extension of time to file an appeal against the judgement of the High Court in succession cause No 1723. This suit did nothing to halt time from running.

28. In essence, time for purposes of calculating the statutory period in Adverse Possession run from 1990 to 2002 when the right to title by Adverse Possession accrued to the Plaintiffs. There is no evidence that the Plaintiffs have been dispossessed from the suit property nor that they have handed over possession to the Defendants.

29. The upshot of this case is that the Plaintiffs possession is adverse and the court determines in favour of the Plaintiffs.

30. The costs shall be borne by the Defendants.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANGA THIS DAY OF 24TH DAY OF JUNE 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st – 3rd Plaintiffs: Present in person. Advocate is absent.

1st and 2nd Defendants – Absent

Njeri and Kuyiki, Court Assistants