

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU
ELC CASE NO. 39 OF 2015

PETER KINYUA NJERU.....
PLAINTIFF

VERSUS

NEPHAT NDWIGA GATUBA.....
.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the originating summons dated 6/3/2014 seeking to be declared to have become entitled to the whole of land known as Evurore/Nguthi/1695(the suit land) through adverse possession. He sought to have the Defendant ordered to transfer the land to him failing which the Deputy Registrar would do so. The Plaintiff's case is that he has occupied the suit land openly, continuously and as of right without interruption for over 12 years and had extensively developed it.
2. The Defendant filed a replying affidavit in response and averred that he is the registered owner of the suit land and that he occupies it. He averred that he occupied the land in 1959 and had extensively developed it. He denied that the Plaintiff is entitled to the land through adverse possession.

3. During the hearing, the Plaintiff stated that he lived on the suit land before the Defendant was registered as proprietor up to date, and that he occupied the land openly and continuously without the Defendant's consent and without paying him rent. He stated that his occupation was not interfered with nor had he been evicted from the suit land.
4. On cross-examination, he stated that he was born in 1958 and that he got into the land because his grandfather and father were on the land. He conceded that the Defendant also lives on the land. He told the court that he had planted mango and avocado trees on the land and indicated in the valuation report. He stated that the Defendant occupied the upper side of the land while he occupied the lower side and that he was only demanding the part which he occupies. He denied having any knowledge that the suit land was the subject of disputes filed by the Defendant.
5. On re-examination, he stated that he has built permanent houses on the land made of brick and has planted trees of different varieties. He stated that he occupies about 2 ½ acres and that he has never had any dispute with anyone over the land. The Plaintiff produced copies of the official search for the suit land parcel together with the valuation and surveyor's report.
6. The Plaintiff called his neighbour, Peterson Ngindori Kamenju as a witness. Mr. Kamenju told the court that the Plaintiff was given the suit land by his father, Njeru Mukundie, which he started

developing. That he has constructed permanent houses and has been cultivating the land for over 40 years continuously and peacefully with his family. He stated that the Plaintiff had developed the land extensively by planting mango trees, grevillea trees and other indigenous trees. He maintained that to date the Plaintiff occupies the suit land with his wife, children and grandchildren.

7. On cross-examination, he stated that the Plaintiff was on the land before 1963 and that there were no cases over the land. He clarified that both the Plaintiff and Defendant live on the suit land and that the Defendant is on the upper side of the land occupying about 2 acres.
8. The Defendant stated that he owns the suit land, which he inherited from his father who had been awarded the land by the elders of his clan, the Nditi Clan, and passed it on to him after his death in 1972. He stated that he has occupied the land since 1959 and has lived on the land with his family. He elaborated that he has built his family a house, planted various trees including avocados, mangoes, connected electricity and water to the land and carries out various farming activities. He stated that the suit land was awarded to him by the Minister vide Minister's Land Appeal Case No. 1 of 1976 - Evurori/Nguthi. The award was upheld by the High Court vide Embu HCC No. 165 of 2008 formerly Nairobi HCC no. 2509/1998 and by the Court of Appeal in Court of Appeal Case No. 110 of 2011.

9. He stated that the Plaintiff is a member of the Mukera Clan and has not exclusively occupied the suit land. He stated that the suit land has been the subject to protracted court battles for over fifty five years with restraining orders in place restricting any dealings with the land and maintenance of status quo. He averred that time for adverse possession if any could not run in favour of the Plaintiff while various court disputes were ongoing centering on ownership of the suit land. That given those court cases, this suit is res judicata.
10. On cross-examination, he confirmed that he got his title over the suit land in 1998 and that the Plaintiff has been residing on the land with his family, had built houses and farmed on the land. He stated that they have had disputes over time and in one instance, they went to the District Officer (D.O) who told them each person to stay on their portion until this suit is determined. He did not have evidence of the cases he claimed to have had with the Plaintiff, and confirmed that the Plaintiff was not a party to the disputes he was referring to. He stated that the Plaintiff is on the land contrary to his wishes and contrary to the law.
11. On re-examination, he stated that from 1958 to 1998, the suit land belonged to his father, which he was given by his Nditi Clan. He stated that the disputes over the land began before 1998 and continued up to 2019 and during that time, there were *status quo* orders issued over the land hence he could not evict the Plaintiff. He stated that it was found that the land belonged to the Nditi Clan. He expounded that they both occupy different

portions of the land that are almost equal and that measurements have not been taken to establish the portions each of them occupied.

12. The Defendant produced copies of documents in Land Adjudication Committee Case No. 16 of 1971, official search over the suit land, judgment in Minister's Appeal Case No. 1 of 1976, the judgment in HCCC No. 165 of 2008, judgment in Civil Appeal No. 110 of 2011 and in Embu ELC JR No. 49 of 2014.
13. The Defendant called Erasmus Ileri Njeru, the Chairman of the Nditi Clan to give evidence. He stated that the Defendant is a member of the Nditi Clan. The clan gave the suit land to the Defendant. It formed part of the original chunk of land measuring 139.5 acres which the Nditi Clan owned before it was subdivided during land demarcation in 1972. He stated that the Defendant's father and his family originally occupied the suit land until his death in 1970. Upon the Defendant's father's death, the Defendant took over possession and had lived on the land with his family. He built his home on the land and carried out various farming activities to date.
14. He stated that the original parcel of land was the subject of litigation before different courts and forums since 1964 and the most recent case was concluded in 2019. The disputes revolved around ownership of the land between the Nditi Clan, Mukera Clan and the Nyonga Clan. The Plaintiff is known to him as the son of Njeru Mukundie and Nduma Macece who were members of Nyonga and Mukera Clan. His view was that the ownership

over the large parcel of land has been subject of court battles for over 55 years which means the Plaintiff has not been in exclusive occupation of the land.

15. On cross examination, he stated that the Plaintiff lives on the suit land although he did not know when he got into the land. He stated that he subdivided the original land in 1972 and at that time the Plaintiff was not on the land. The Plaintiff was not part of the court disputes over the years and they did not evict him from the land. On re-examination, he stated that the Plaintiff's father was involved in the court cases as his clan had representatives. He stated that the Defendant has also developed the land, connected electricity and built his home.
16. Parties file written submissions, which the court considered. The Plaintiff submitted that his occupation of the suit land was not been denied by the Defendant and his witnesses. He has developed the land as the valuation report shows. He submitted that the Defendant did not produce any evidence that there were cases between them over the suit land. He maintained that the land ceased to be clan land in 1998 when the Defendant was registered as the owner of the land, which is about 17 years up to 2015 when he filed the instant suit. He pointed out that the Defendant admitted that he is on the land against his wishes therefore, he has proved his claim for adverse possession.
17. The Defendant submitted that throughout his pleadings, the Plaintiff avoided indicating the date he entered the suit land making it difficult to establish when the 12 years began running

for purposes of adverse possession. That given that the Plaintiff and his witnesses maintained that he was given the land by his father, the Plaintiff entered the land not for purposes of dispossessing the Defendant but because the suit land was a gift. That therefore, his claim that it was a gift is inconsistent with the claim for adverse possession. He cited **Richard Wefwafwa Songoi versus Ben Munyifwa Songoi (2020) eKLR** in support this position.

18. Further, it was submitted that the Plaintiff's occupation was not been exclusive given that the Defendant also lives on the same land and that the Defendant had not therefore been dispossessed of the suit land. It was urged that the Plaintiff's possession was interrupted by the various court cases that were filed over the subject land and the disputes that the Defendant referred to the Chief against the Plaintiff over the suit land. He submitted that the valuation report that the Plaintiff produced does not show the area the Plaintiff claims to occupy there being no map attached to the report. He averred that the report states that the Plaintiff occupies 1.57 hectares yet according to the Originating Summons, the Plaintiff claims the entire suit land comprising 2.2 hectares. The Defendant urged that those contradictions prove that the Plaintiff's evidence consists of mere fabrications and lies. The court was invited to dismiss the suit.
19. The issue for determination is whether the Plaintiff has proved on a balance of probabilities that he is entitled to the whole of

Evurore/Nguthi/1695 through adverse possession. It is not in dispute that both the Plaintiff and the Defendant occupy the suit land. The land is registered in the name of the Defendant, who claims to have acquired it from his father, who was allocated the land by his clan, the Nditi Clan. The Plaintiff, on the other hand, states that he entered and has remained on the suit land since it was given to him by his father, who himself occupied the land as a member of a different clan since he was born in 1958.

20. The Defendant contended that because the Plaintiff's entry onto the land was pursuant to a gift, the Plaintiff could not raise a claim for adverse possession. That entry based on a gift or permission is inconsistent with the hostile and adverse possession required by law. The evidence shows that the Plaintiff entered the suit land after his father gave it to him and continued to occupy it openly without the consent of the Defendant after he was registered as the proprietor of the land in 1998.
21. The Plaintiff's occupation was evident to the Defendant given the developments the Plaintiff made on the land. From the valuation and survey reports produced by the Plaintiff, the suit land measures approximately 2.2 hectares (5.43 acres). The reports confirm the Plaintiff's significant developments on the land including a two-bedroom bungalow, semi-permanent house trees and crops such as mangoes, avocados, and grevillea trees. The photographs attached to the report confirm the existence of

these developments on the suit land. Further, it shows that the Plaintiff occupies about 1.57 hectares of the suit land.

22. The Defendant argued that the Plaintiff's possession was interrupted by the numerous disputes over ownership of the suit land. He produced several judgments relating to those disputes. The Defendant admitted and it is evident from the judgments which the Defendant produced that the Plaintiff was not a party to those disputes, and that it was the Plaintiff's father, Njeru Mukumie, who was a party to them as a representative of the clan. The disputes did not directly relate to the suit land but to the entire clan land.
23. For possession to be interrupted, the registered owner must make an effective entry into the land to assert his title, or commence legal proceedings against the person in possession to recover possession of the land. In this case, the Defendant admitted that he had not taken any steps to evict the Plaintiff from the suit land. He has not filed a suit seeking to recover possession from the Plaintiff. The Defendant failed to prove that orders of *status quo* were in place which prevented him from evicting the Plaintiff. The court is persuaded that the Plaintiff's occupation of part of the suit land has been uninterrupted.
24. The Plaintiff and his witnesses claim that he has been in possession of the suit land since 1958 when he was born. The Defendant's witness claimed that he did not know when the Plaintiff got into the land but in 1972 when he was subdividing the clan land, the Plaintiff was not on the land. As at 1998 when

the Defendant was registered as proprietor of the suit land, the Defendant was on the land. Time for purposes of adverse possession started running from 7/1/1998 when the Defendant was registered as proprietor. By the time the Plaintiff filed this suit on 6/3/2014, 16 years had elapsed which is within the prescribed statutory period.

25. The Defendant argued that this suit was *res judicata* on account of the earlier court cases relating to ownership of the suit land. The Plaintiff was not a party in those suits and the claim for adverse possession of Evurore/Nguthi/1695 was not directly in issue in those cases and was not determined. *Res judicata* does not apply in the circumstances of this suit.
26. The Plaintiff has proved on a balance of probabilities that he has become entitled to the portion of Evurore/Nguthi/1695 where he has built and farms through adverse possession. The Plaintiff will cause a survey of the suit land to be undertaken to carve out the portion on which he has built, planted trees and farms so that a title deed can be issued to him for that portion.
27. If the Defendant declines or fails to surrender the original title of the suit land for purposes of the survey and excision exercise as directed by the court, the Deputy Registrar of the court will execute the necessary documents to facilitate the survey and transfer process. The Plaintiff will meet the expenses of the whole exercise. Should the Defendant fail to surrender the original title deed for purposes of the excision and transfer of the

portion of the suit land to the Plaintiff, the Land Registrar will dispense with the production of the original title deed.

28. Each party will bear their costs of the suit.

Delivered virtually at Bungoma this 11th day of February 2026.

**K. BOR
JUDGE**

In the presence of: -

Mr. Lugard Mogusu for the Plaintiff

Mr. Nephath Ndwiga Gatuba- the Defendant

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